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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 81

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, PETITIONER,

vs.

MRS. MYRTIS COOK ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 9, 1929

CERTIORARI GRANTED OCTOBER 14, 1929

(34,194)

(34,194)

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF TEXAS

IN DISTRICT COURT OF HARRIS COUNTY, 61ST JUDICIAL DISTRICT OF TEXAS

No. 134,989

Mrs. MYRTIS COOK et al.

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

PLAINTIFF'S ORIGINAL PETITION

From Transcript of Record from State Dist. Court, Filed Aug. 8, 1927

To the Honorable Judge of said Court:

Now comes Mrs. Myrtis Cook, widow, for herself and as next friend of Geraldine Cook, a minor, hereinafter called [fol. 2] plaintiff, complaining of and against Employers Liability Assurance Corporation, Ltd., hereinafter called defendant, and for cause of action represents to the Court:

I

That the plaintiff resides in Harris County, Texas; and that the defendant is a corporation created by the laws of the State of Massachusetts, and with a permit to do business in the State of Texas, and with an office and local agent in Harris County, Texas, to-wit, Rice & Belk, a partnership of which B. B. Rice and Craig Belk are the partners, and is engaged in the business of writing compensation insurance under what is known as the Workmen's Compensation Law in Harris County, Texas.

II

That Hal Cook was a machinist employed by the Ford Motor Company for a period of more than three years prior to January 26, 1927, and during that time was engaged in such trade or occupation, working on the construction of automobiles at the plant of the Ford Motor Company at Houston, Harris County, Texas, assisting in the construction of automobiles and various and sundry other work around the plant of said Ford Motor Company as a machinist.

III

That on or about the 26th day of January, 1927, said Hal Cook was employed by said Ford Motor Company, his said employer at that time carrying compensation insurance upon its employees, including the said Hal Cook, with the defendant Employers Liability Assurance Corporation, [fol. 3] Ltd., under and by virtue of the provisions of the Workmen's Compensation Act of the State of Texas that his said employer, Ford Motor Company, so carried said compensation insurance by a policy in writing and contract between the said employer and the said Employers Liability Assurance Corporation, Ltd.; and the defendant is here now giving formal notice to produce upon trial hereof the original of said policy or a duplicate original thereof, or its original memoranda thereof, and is further given formal notice that upon its failure so to do, secondary evidence thereof will be offered in evidence.

IV

That on or about the 26th day of January, 1927, while in the course of his employment, said Hal Cook was instructed by said Ford Motor Company to assist in unloading a ship or vessel belonging to the said Ford Motor Company, then anchored at the wharves at the Houston Ship Channel at Houston, Texas, and while so engaged said Hal Cook suffered severe injuries in that while he and other employees of the said Ford Motor Company were unloading from said ship the cargo thereon, consisting of axles and various other parts of automobiles and transferring the same to the wharves where said ship was anchored, the said

Hal Cook while lifting said automobile parts, received a severe strain to the internal muscles of his back and abdominal, and testical cavities, straining, tearing, and otherwise injuring the muscles, tendons and ligaments of his back, abdominal cavity, and testical cavity, which resulted in serious and permanent injuries to his back and abdominal and testical cavities, which totally incapacitated said Hal Cook from doing or performing any work thereafter, except very light work for a few hours thereafter, to-wit, [fol. 4] three or four hours. That said Hal Cook returned to his home and thereafter on the same day consulted a physician and was treated for the injuries so received, and within a few days thereafter was operated on for a varicocele vein, which did not relieve his pain and suffering, and thereafter consulted several other physicians and was treated by them and was taken to the Methodist Hospital in the City of Houston where he remained under treatment for approximately three weeks, after which he was carried to his home, at which place he died on or about March 28, 1927. That at the time of the injuries so sustained by the deceased, and at all times prior thereto, said deceased was in good health and sound in mind and body, and that his death was directly and proximately caused by the injuries so sustained by him, as above set forth. That from the time of the injuries to the time of his death, said deceased suffered constantly with severe pains in the lumbar region of his back and in the lower abdominal cavity, and testical cavity, which, within a few hours after said injuries were sustained, rendered his further working impossible.

V

Plaintiff would further represent to the Court that the defendant, Employers Liability Assurance Corporation, Ltd., was notified of the injuries received by the deceased, to-wit, on February 16, 1927, and prior to death of deceased, but said defendant failed and refused to pay said deceased anything as compensation for the injuries received by him and the consequent total disability he was suffering at that time and continued to suffer until the time of his death. That at the time said deceased received the injuries, as above set forth, he was regularly employed by the

said Ford Motor Company and was receiving wages at the [fol. 5] rate of *of* $6.80 per day for his services and had received said wages a long time prior thereto, and by reason thereof plaintiff herein, for herself and as next friend of said minor, is entitled to compensation for the death of said deceased at the rate of Twenty and no/100 Dollars ($20.00) per week for three hundred and sixty (360) weeks.

VI

Plaintiff alleges that within thirty (30) days from the date of the death of said deceased she gave notice thereof to the defendant herein and filed her claim for compensation for herself and said Geraldine Cook, a minor child of said deceased, with the Industrial Accident Board of the State of Texas, to-wit: On April 7, 1927; and that thereafter, after due notice to all parties at interest, and on May 18, 1927, the Industrial Accident Board made its final award, a copy of which award is attached hereto, marked "Exhibit A" and made a part hereof for jurisdictional purposes only; that thereafter, and within twenty (20) days after said final ruling and decision of the Industrial Accident Board, to-wit: On May 30, 1927, plaintiff, for herself as the surviving widow of said Hal Cook, deceased, and for Geraldine Cook, surviving minor child of deceased, notified the defendant, Employers Liability Assurance Corporation, Ltd., that she was not willing and did not consent to abide by the final ruling, award, and decision of the Industrial Accident Board of the State of Texas, made in said cause, as aforesaid, and this suit is now filed for the purpose of setting aside said award, final ruling, and decision of the Industrial Accident Board of the State of Texas, and to recover of and from the defendant, Employers Liability Assurance Corporation, Ltd., the compensation which this plaintiff claims [fol. 6] for herself, individually, and as next friend of Geraldine Cook, a minor, before said Industrial Accident Board, and now claims on account of the death of said Hal Cook resulting from injuries and disabilities above set forth which he received while in the course of his employment with the said Ford Motor Company.

VII

That the plaintiff, for herself and for Geraldine Cook, a minor, presented their claim for compensation before the

Industrial Accident Board of the State of Texas, and that said Board made a final ruling, award, and decision on said claim, and that within twenty (20) days after said final ruling and decision were made by the said Board, the plaintiff herein, acting by and through her attorney, mailed to the Industrial Accident Board at Austin, Texas, to the defendant, Employers Liability Assurance Corporation, Ltd., Houston, Texas, and to the Ford Motor Company, Houston, Texas, by registered mail, the following letter, which was received by them in due course of mail and within twenty (20) days after said final ruling and decision:

[fol. 7] "Houston, Texas, May 30, 1927.

H. Cook vs. Ford Motor Co. M-12196.
Employers' Liability Assurance Corporation, Ltd.,
Messrs. John L. Wortham & Son, Gen'l Agents.
Bankers Mortgage Building, Houston, Texas.
Ford Motor Company, Houston, Texas; Industrial Accident Board, Austin, Texas.

GENTLEMEN: You, and each of you, are hereby notified in accordance with Section 5, Part 2, Article 8307, Revised Civil Statutes of 1925, of the Workmen's Compensation Law of the State of Texas, that Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, interested parties in the above entitled numbered cause, will not abide by the award, final ruling, and decision made by the Industrial Accident Board of the State of Texas, on the 18th day of May, A. D. 1927, wherein the said Industrial Accident Board denied the claim of Mrs. Myrtis Cook, surviving widow, and Geraldine Cook, surviving minor child of H. Cook, deceased, against the Employers Liability Assurance Corporation, Limited, insurer, on account of personal injuries suffered by said H. Cook, deceased, on or about the 26th day of January, A. D. 1927, while in the employ of the said Ford Motor Company, at Houston, Harris County, Texas; and that the said Mrs. Myrtis Cook and the said Geraldine Cook are interested parties herein and are not [fol. 8] willing and do not consent to abide by the final ruling, decision, and award of the said Industrial Accident Board of the State of Texas.

And notice is also hereby given by the said Mrs. Myrtis Cook, surviving widow, and Geraldine Cook, a minor child

of said H. Cook, deceased, that within twenty days from the date of service of this notice suit will be brought by the said Mrs. Myrtis Cook for herself and as next friend of Geraldine Cook, a minor, in some Court of competent jurisdiction in the county where said injury occurred to set aside the said award, final ruling, and decision of the said Industrial Accident Board of the State of Texas, and the trial de novo of said cause for the full amount of their claim, as provided for in said Workmen's Compensation Law, 1925, of the State of Texas.

Dated at Houston, Texas, on this the 31st day of May, A. D. 1927.

Mrs. Myrtis Cook, Individually and as Next Friend of Geraldine Cook, a Minor, by Sam C. Polk, Attorney of Record."

and defendant is here now given formal notice to produce the original of said letter and notice which was sent by registered mail and received by defendant, as aforesaid, upon trial hereof, and that upon its failure so to produce the same, secondary evidence thereof will be offered in evidence.

VIII

Plaintiff would further show to the Court that she was the wife and is the widow of said Hal Cook, deceased, and that Geraldine Cook is a female about eighteen (18) months of age and is the daughter of said deceased and plaintiff [fol. 9] herein and their only child, and that they are the nearest of kin of said deceased and are entitled to receive compensation for the death of said deceased; that by reason of the injuries sustained by the said Hal Cook, deceased, which resulted in his death, plaintiff and said Geraldine Cook, a minor, are entitled to recover of and from the defendant, Employers' Liability Assurance Corporation, Ltd., the sum of Twenty Dollars ($20.00) per week for the full, definite, and fixed period of three hundred sixty (360) weeks.

IX

Plaintiff would further show to the Court that in order to prepare and properly present her said claim to the said Industrial Accident Board, she employed Sam C. Polk, an attorney, to represent her; and the said named attorney did prepare and present her said claim and the claim of said

minor to said Industrial Accident Board, and that by reason of the award of said Board, denying to plaintiff and said minor any recovery as compensation for the death of said deceased, plaintiff has been compelled to employ said attorney to set aside said award and to prosecute this cause of action and to prosecute her said claim and the claim of said minor in this proceeding, and that she has so employed said attorney and has promised and is willing to pay him as his compensation herein and for his services rendered and to be rendered herein, one-third (⅓rd) of the amount recovered, and has by formal assignment and power of attorney secured him in the same, which said amount and interest in said claim, taking into consideration the services of said attorney before said Industrial Accident Board and before this Court, is fair and reasonable compensation for his services.

[fol. 10] Wherefore, plaintiff prays that the defendant be cited to appear and answer herein, and that upon trial hereof she have judgment setting aside the aforementioned award of the Industrial Accident Board, and for such compensation for herself and for said Geraldine Cook, a minor, to which she may be able to show herself and said minor justly entitled to receive under the law and the facts; and that her said attorney be protected in his interest in said claim and have the same set aside to him and judgment entered herein in his behalf for one-third (⅓rd) of the recovery herein, or for such other amount as to the Court may seem just and fair; and plaintiff further prays for interest, costs of suit, and for such other and further relief, general or special, at law or in equity, to which she may show herself justly entitled to receive.

Sam C. Polk, Attorney for Plaintiff.

EXHIBIT "A" TO PETITION

M-12196

H. COOK, Employee,

vs.

FORD MOTOR COMPANY, Employer; Employers' Liability Assurance Corporation, Ltd., Insurer

On this 18th day of May, A. D. 1927, after due notice to all parties at interest, came on to be considered by the In-

dustrial Accident Board claims for compensation made and asserted herein by Mrs. Myrtis Cook, surviving widow and Geraldine Cook, surviving minor child of H. Cook, deceased, against the Employers' Liability Assurance Corporation, [fol. 11] Limited, which have not been settled by agreement between the parties, and the Board now finds and orders as follows:

That said beneficiaries have failed to sustain the burden imposed upon them by law to establish to the satisfaction of the Board that H. Cook, deceased, suffered fatal injury and consequent death while engaged in the course of his employment in the capacity of employee for the subscribing employer herein, but to the contrary it has been made to appear that his death was due to a condition in no way incident to or associated with his employment, and therefore said claims for compensation must be and the same are hereby denied and refused and the said Employers' Liability Assurance Corporation, Limited, must be and is hereby fully and finally acquitted and discharged from all liability on account of the claims for compensation of Mrs. Myrtis Cook and Geraldine Cook, and it is so ordered, adjudged and decreed by the Board.

O. M. Duclos, Clerk District Court, Harris County, Texas, by A. W. Heinze, Deputy.

Filed June 15, 1927.

[fol. 12] IN UNITED STATES DISTRICT COURT

PLEA TO THE JURISDICTION AND ANSWER—Filed Aug. 31, 1927

To the Honorable said Court:

The Employers' Liability Assurance Corporation, Ltd., of London, England, defendant herein, files this its plea to the jurisdiction of the Court and says that this Court does not have jurisdiction of the cause of action asserted herein for the following reason:

I

This suit is brought by Mrs. Myrtis Cook, for herself and as next friend of her minor daughter, Geraldine Cook,

against this defendant to recover compensation under the Workmen's Compensation Act of the State of Texas, as beneficiary of Hal Cook, it being alleged in the petition that Hal Cook was an employee of the Ford Motor Company, and that he received injuries as an employee of the Ford Motor Company which directly resulted in his death; it being further alleged that the Ford Motor Company was a subscriber under the Texas Workmen's Compensation Act at the time of the alleged injuries received by Hal Cook and that this defendant had issued a policy of Workmen's Compensation Insurance under the Texas Workmen's Compensation Act insuring the employees of the Ford Motor Company under and by virtue of the terms of the Texas Workmen's Compensation Act.

This defendant avers that the Ford Motor Company at the time of the alleged injuries received by Hal Cook and for a long time prior thereto, was a foreign corporation, [fol. 13] organized and existing under and by virtue of the laws of the State of Michigan, that it was engaged generally in the manufacture and sale of Ford automobiles, parts and accessories thereto; that on January 26th, 1927, and a long time prior thereto, the Ford Motor Company conducted and operated branch offices in several states of the United States of America, including a branch office in the city of Houston, Harris County, Texas, where Ford automobiles were assembled and parts and accessories thereof sold.

On January 26th, 1927, and a long time prior thereto the Ford Motor Company owned and operated under United States Registry several ships, among which was the Lake Gorin, and were operated from the port at Detroit, Michigan, on the open seas and return, including the port of Houston, Texas; that these ships were owned and operated by the Ford Motor Company as a necessary and essential part of its business in manufacturing and selling automobiles, parts and accessories thereto; that if Hal Cook, deceased, received any injuries as set forth in plaintiff's petition, that the same were received by him while he was actually engaged in unloading the cargo on the ship, Lake Gorin, and while actually on said ship, and while the same was anchored in navigable waters of the United States of America at Port Houston, Harris County, Texas;

that the said ship, Lake Gorin, plied between the Port of Detroit, Michigan, and Houston, Texas, and that the particular cargo which the said Hal Cook was unloading at the time he sustained his alleged injuries originated in its home port at Detroit, Michigan, and destined to Port Houston in Harris County, Texas; that the said Hal Cook's employment expressly provided and contemplated that he should unload cargoes from ships owned and operated by [fol. 14] his employers, the Ford Motor Company, and that he was acting within the actual scope of his employment at the time he received his alleged injuries.

It, therefore, appears that Hal Cook, deceased, was engaged in the performance of a maritime contract and was actually aiding and assisting navigation and performing work of a maritime nature and the workmen's Compensation Act of the State of Texas is inapplicable and that the said cause of action is one within the exclusive maritime jurisdiction of the United States District Court.

Wherefore, defendant prays that this suit be dismissed for lack of jurisdiction and it recover all costs expended.

Without waiving the foregoing plea to the jurisdiction, but subject thereto, defendant for answer, if required, says:

I

It demurs generally to said petition because the same is wholly insufficient in law to state a cause of action against it, and of this general demurrer defendant prays judgment of the Court.

II

Defendant specially excepts to plaintiff's petition because it affirmatively appears that the alleged injuries sustained by Hal Cook, deceased, were sustained while he was engaged in the performance of a maritime contract and doing maritime work and was aiding and assisting navigation, and that, therefore it is a suit exclusively within the maritime jurisdiction of the United States District Court, and the Workmen's Compensation Act of the State of Texas upon [fol. 15] which the cause of action is asserted is inapplicable and invalid as in violation of Article 3, Section 2, of the Constitution of the United States of America.

III

For answer, if required, this defendant denies all and singular each and every allegation contained in plaintiff's petition, demands strict proof thereof and of this general denial puts itself upon the country.

Employer's Liability Assurance Corporation, Lt.', of London, England, by Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

JUDGMENT

Be it Remembered, that on the 25th day of April, A. D. 1928, came on to be heard in regular order the above entitled and numbered cause, when came the plaintiffs, Mrs. Myrtis Cook, individually and as next friend of Geraldine Cook, a minor, in person and by her attorneys, and announced ready for trial; and also came the defendant, Employers' Liability Assurance Corporation, Ltd., of London, England, by its attorneys, and announced ready for trial; whereupon came a jury of twelve good and lawful men who were duly impaneled and sworn to try the issues in said cause, whereupon the cause proceeded to trial; and after the introduction of the evidence adduced by plaintiffs and [fol. 16] defendant and after argument of counsel, the Court charged the jury and submitted to them the issue of fact involved; whereupon the jury retired and on the following day, to-wit: April 26, 1928, returned into open Court their verdict, as follows:

"We, the Jury, find for the Plaintiffs.

(Signed) C. H. Menke, Foreman."

And it appearing to the Court from the pleadings, evidence and the verdict of the Jury that the plaintiffs are entitled to recover of and from the defendants as prayed, it is, therefore,

Ordered, adjudged and decreed by the Court that the plaintiffs, Mrs. Myrtis Cook and Geraldine Cook, a minor, do have and recover of and from the defendant, Employers'

Liability Assurance Corporation, Ltd., of London, England, a corporation, the sum of Seven Thousand Two Hundred ($7,200.00) Dollars, being the maximum amount allowed by the Workmen's Compensation Act of the State of Texas for death, to-wit: Twenty ($20.00) Dollars per week for the full, definite and fixed period of Three Hundred Sixty (360) weeks.

And it further appearing to the Court that Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, entered into a contract in writing with Sam C. Polk, an attorney, to represent said plaintiffs before the Industrial Accident Board of the State of Texas in presenting their claim for compensation for the death of Hal Cook, and to file this suit to set aside the final award of said Board on said application, and agreed to pay said attorney one-third of the recovery herein, the Court is of the opinion, and so finds, that the compensation agreed [fol. 17] upon for the services of said attorney is reasonable and that said contract on behalf of both plaintiffs herein ought to be in all things approved, and that said attorney should be awarded one-third of the recovery, herein or the sum of Two Thousand Four *Four* Hundred ($2,400.00) Dollars; it is, therefore,

Ordered, Adjudged and Decreed by the Court that the contract of employment between Mrs. Myrtis Cook, for herself and as next friend of Geraldine Cook, a minor, with Sem C. Polk, an attorney, for professional services, be and the same is here now and in all things affirmed and approved.

And it further appearing to the Court that Geraldine Cook is a minor without a legal guardian and that said minor should recover one-third of the recovery herein, and that Mrs. Myrtis Cook should recover one-third of the recovery herein, and that Sam C. Polk should recover one-third of the recovery herein; it is, therefore, further

Ordered, Adjudged and Decreed by the Court that the amount recovered herein by Mrs. Myrtis Cook, Two Thousand Four Hundred ($2,400.00) Dollars, be and the same is here now ordered paid to her by the defendant in weekly installments of Six and 66⅔/100 ($6.66⅔) Dollars per week; that the amount recovered by the minor, Geraldine Cook, Two Thousand Four Hundred ($2,400.00) Dollars, be

and the same is here now ordered paid into the registry of this Court in the sum of Six and 66⅔/100 ($6.66⅔) Dollars per week, said payments to be made direct to her guardian when said guardian is appointed and has qualified; and that the amount recovered by Sam C. Polk as attorney for said plaintiff, Two Thousand Four Hundred ($2,400.00) Dollars, be and the same is here now ordered paid to him in weekly installments of Six and 66⅔/100 ($6.66⅔) Dollars per week; the payment of said weekly installments to continue for the fixed and definite period of three hundred [fol. 18] sixty (360) weeks from the date of this judgment, with interest on the respective amounts above set forth from date of judgment until payments are begun at the rate of six per cent per annum, said accrued interest, if any, and all past due weekly payments to be paid when payment of said weekly installments are begun.

All costs in this behalf expended are here now adjudged against the defendant.

For all of the above proper writs may issue. To which judgment defendant excepts and gives notice of appeal.

J. C. Hutcheson, Jr., Judge.

IN UNITED STATES DISTRICT COURT

MOTION FOR NEW TRIAL—Filed May 8, 1928

Comes the Employers' Liability Assurance Corporation, Ltd., of London, England and respectfully prays the Court to grant it a new trial for the following good and sufficient reasons:

I

Because there is no competent evidence in the record upon which to base a judgment in favor of the plaintiffs against the defendant.

II

Because the judgment is against the overwhelming preponderance of the evidence.

[fol. 19]

III

The Court erred in not instructing a verdict in favor of the defendant because there was no evidence of any pro-

bative force offered to show that the deceased, Hal Cook, received an accidental injury in the course of his employment.

IV

The undisputed evidence in the case showing that the primary cause of the death of Hal Cook was secondary anemia, and it being the contention of plaintiffs that the secondary cause was thrombus of the mesenteric veins caused and produced by a strain while the deceased Hal Cook, was unloading the ship Lake Gorin for the Ford Motor Company, the burden of proof was upon plaintiffs to establish by a preponderance of the evidence that the deceased, Hal Cook, did in fact receive or sustain thrombus of the mesenteric veins, and that the same was brought about or caused by strain while working for the Ford Motor Company, and there being no competent evidence in the record to show that the deceased, Hal Cook, did receive a thrombus of the mesenteric veins following a strain, the Court should have instructed a verdict for the defendant.

V

The Court erred in not instructing a verdict in favor of the defendant because there is no competent evidence in the record of sufficient probative force to warrant a finding that the deceased Hal Cook, received a strain while unloading the ship Lake Gorin which produced thrombus of the mesenteric veins causing his death.

[fol. 20] VI

The Court erred in refusing to give the following instruction requested by the defendant:

"Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way in lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence."

because under the Texas Workmen's Compensation Law, a strain received in ordinary lifting by reason of the work

itself, where nothing happened or occurred suddenly, unexpectedly and fortuitously, it would not be personal injury or accidental injury within the scope of the Texas Workmen's Compensation Act.

VII

The Court erred in instructing the jury as follows:

"I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got these strains every day."

because if the strain permits a recovery even though the deceased Hal Cook, strained himself in the ordinary manner and way of lifting without the happening of a sudden, unexpected and fortuitous event, and permits a recovery even though the deceased, Hal Cook, strained himself in lifting parts in the usual and customary way without any mishap of fortuitous occurrence.

[fol. 21]

VIII

In order for the beneficiary of Hal Cook to have predicated liability upon a strain, the burden of proof was upon the beneficiary to prove by a preponderance of the evidence, that at a time and place certain the deceased, Hal Cook, in attempting to lift an automobile part, slipped or made an unusual life or strain, or that there was some other unexpected and fortuitous event in the lifting and as there is no evidence in the record to show that the deceased, Hal Cook, did not lift the parts in the ordinary and usual manner and just as he expected and intended to do, and with no evidence in the record to show that he slipped or made an unusual strain at a definite time and place, there was no evidence in the record to show that deceased received an accidental injury and the Court should have, therefore, instructed a verdict for the defendant.

IX

The Court erred in not instructing the jury to return a verdict in favor of the defendant because under the undisputed evidence the said Hal Cook was engaged in a maritime contract and doing work of a maritime nature

at the time of the alleged injury, and, therefore, the cause of action would be exclusively within the maritime jurisdiction of the United States District Court.

X

The undisputed evidence showing that it was expressly provided in the contract of employment of the deceased, Hal Cook, that he should unload ships of his employer and that the unloading of ships was as much a part of his em-
[fol. 22] ployment and the duties of his employment as assembling automobiles and the undisputed proof showing that at the time of the alleged injuries he was in the performance of his contract in unloading a ship in navigable waters, and that it was absolutely necessary and essential to navigation that the ship be unloaded, and that, therefore, the said Hal Cook was engaged in the performance of a maritime contract and doing work of a maritime nature at the time of the alleged injury, and the cause of action was exclusively within the maritime jurisdiction of the United States District Court and the Texas Workmen's Compensation Act did not apply.

XI

The undisputed evidence showing that at the time the deceased, Hal Cook, sustained the alleged injury he was unloading a ship on navigable waters, and that it was absolutely necessary and essential to navigation and interstate commerce that the ship be unloaded and therefore, he was doing work of a maritime nature at the time of the alleged injury, and the cause of action was exclusively within the maritime jurisdiction of the United States District Court and the Workmen's Compensation Act did not apply.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

STATE OF TEXAS,
County of Harris:

Service and time of the within motion for new trial is expressly waived by the plaintiff and the plaintiffs acknowledge copy of said motion for new trial.

Polk & Allen, Attorneys for Plaintiffs.

[fol. 23] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING DEF'T'S MOTION FOR NEW TRIAL—Filed June 26, 1928

On June 2nd, A. D. 1928, came on for hearing Defendant's Motion for New Trial and the Court after having heard and duly considered the same, is of the opinion and so finds that the same should be overruled.

It is therefore ordered, adjudged and decreed that the Motion for New Trial filed herein by the Employers' Liability Assurance Corporation, Ltd., of London, England, be and the same is in all things overruled, to which action of the Court the defendant in open Court excepted and gave notice of appeal to the Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana.

J. C. Hutcheson, Jr., Clerk.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 11, 1928

To Mrs. Myrtis Cook, a femme sole; Geraldine Cook, a minor; Sam C. Polk and Polk & Allen, attorneys of record:

You and each of you are hereby notified that the Employers' Liability Assurance Corporation, Ltd., of London, England, defendant in the above entitled and numbered [fol. 24] cause, appeals from the judgment rendered in said cause against it in the United States District Court for the Southern District of Texas, Houston Division, in favor of Mrs. Myrtis Cook, a femme sole, Geraldine Cook, a minor and Sam C. Polk, to the Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana.

Dated this the 9th day of July, 1928.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

STATE OF TEXAS,
County of Harris:

Before me, the undersigned authority, on this day personally appeared C. M. Hightower, who having been by me duly sworn deposes and says:

On the 9th day of July, 1928, at 12 o'clock, M., I served a true and correct copy of the within notice upon Sam C. Polk, of the law firm of Polk & Allen, attorneys for the plaintiffs in the above entitled and numbered cause.

C. M. Hightower.

Subscribed and sworn to before me this the 9th day of July, 1928. E. D. Adams, Notary Public, Harris County, Texas.

We, Polk & Allen, attorneys for plaintiffs in the above entitled and numbered cause, accept and acknowledge receipt of a true and correct copy of the within notice of appeal, this the 9th day of July, 1928, and hereby expressly waive any right to further notice of appeal by citation in error.

Polk & Allen, by Sam C. Polk.

[fol. 25] IN UNITED STATES DISTRICT COURT

NOTICE TO COURT THAT DEFENDANT APPEALS—July 11, 1928

To the Honorable J. C. Hutcheson, Jr., Judge of the United States District Court in and for the Southern District of Texas, Houston Division:

The Employers' Liability Assurance Corporation, Ltd., of London, England, the defendant in the above entitled and numbered cause, hereby gives notice that it appeals from the final judgment of this Court rendered against it in favor of Mrs. Myrtis Cook, a femme sole, Geraldine Cook, a minor and Sam C. Polk, which said judgment was rendered in the United States District Court for the Southern District of Texas, Houston Division at the February Term, A. D. 1928 of said Court.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed July 11, 1928

To the Honorable J. C. Hutcheson, Jr., Judge of the United States District Court in and for the Southern District of Texas, Houston Division:

[fol. 26] Now comes the Employers' Liability Assurance Corporation, Ltd., of London, England, the defendant in the above entitled and numbered cause, by Vinson, Elkins, Sweeton & Weems, its attorneys, and feeling itself aggrieved by the judgment of this Court entered against it and in favor of Mrs. Myrtis Cook, a feme sole, Geraldine Cook, a minor and Sam C. Polk, plaintiffs in said cause, on the 4th day of May A. D. 1928 in which said judgment and the proceedings had prior thereto in said cause, certain errors were committed to the prejudice of this defendant, all of which will more fully appear in detail from the Assignments of Error which are filed with this petition, hereby pray that an appeal may be allowed to it from the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to the District Court of the United States for the Southern District of Texas, Houston Division.

Wherefore, this defendant prays that an appeal may issue in this behalf out of said United States Circuit Court of Appeals for the Fifth Circuit for the correction of the error so complained of, and that a transcript of the record, proceedings and papers of this Court duly authenticated, may be sent to the said Circuit Court of Appeals, and that after due hearing there be judgment reversing the decree of the said District Court; that an order of supersedeas may be entered herein pending the final disposition of the cause, and that the amount of the security may be fixed by the order allowing the appeal, and that petitioner may have such other and further relief in the premises as may be just.

Vinson, Elkins, Sweeton & Weems, Attorneys for Defendant.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL AND FIXING BOND—Filed July 11, 1928

On this, the 11th day of July, 1928, came The Employers' Liability Assurance Corporation, Ltd., of London, England, defendant in the above entitled and numbered cause, and filed herein and presented to the Court its petition praying for allowance of an appeal and an assignment of errors intended to be urged by it; praying also that a Transcript of the Record, proceedings and papers upon which the judgment herein was rendered, duly authenticated may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, and that such other and further proceedings may be had as may be proper in the premises, and praying also that an order of supersedeas may be entered herein pending final disposition of the cause and the amount of security may be fixed upon order allowing the appeal.

On consideration whereof, the appeal is hereby granted and allowed to have reviewed by said United States Circuit Court of Appeals, Fifth Circuit, at New Orleans, Louisiana, the said judgment rendered by the Court as aforesaid upon the giving, entering into and filing of the supersedeas bond in the penalty of Ten Thousand Dollars ($10,000.00) to be payable and conditioned as required by law, the said bond to be approved in accordance with the law. Upon the execution and filing of said bond, the execution of said judgment will be superseded.

J. C. Hutcheson, Jr., District Judge.

[fol. 28] IN UNITED STATES DISTRICT COURT

Bill of Exceptions

Be it remembered that on the trial of the above numbered and entitled cause, on the twenty-fifth day of April, 1928, the following proceedings were had, to-wit:

E. B. FLUKINGER, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is E. B. Flukinger. I live at 3414 Commerce Street, Houston, Texas. At the present time I am a bus driver for the Houston Electric Company.

In January, 1927, I was working for the Ford Motor Company. I did not have any regular job there. They switched me around.

On or about the twenty-fifth day of January, 1927, along with other employees of the Ford Motor Company, I was engaged in unloading a boat belonging to the Ford Motor Company containing parts. It has been so long now that I don't know whether we went down there to start to work that same night or not. I do not recall that at this time because we helped unload several. We went to work at different times every day.

I recall that Mr. Hal Cook was down there at work that night. We were working in the hatch. It was at one end, hatch one or four. I think we were working at one of the end hatches. We were unloading batteries and truck axles and such as that. They had a pan they would drop down there by a crane and we would load those batteries and rear axles or whatever was below out of the hatch. Mr. Cook was there that night engaged in doing that work.

[fol. 29] Mr. Cook did not continue to work all the time I was there. He quit before we finished. After we went down in there and worked a while he complained of his back hurting him, and we asked him how come he stayed down there.

We changed around all the time as to the man we worked with. These batteries come in crates and it would take two men to lift them and whatever men happened to be together would handle them. We swapped around. We did not have any real partners. We just swapped around in the hatch. In other words, no two men worked together all the time.

I do not remember whether I saw Mr. Cook when he quit work. I remember seeing him go out of the hatch. I do not know how come him to go out of the hatch, but I saw him when he was climbing up out of the hold.

He complained of his back before he left, before he went up out of the hold. We would say, "Cook, stand over to one side and don't work if you don't feel like it." And we

asked him how come he didn't go home. When he would stand up he would hold his hands on his hips like, on his back, standing up against the side of the hatch. When he left that was the last I saw of him, when he was climbing up out of the hatch.

I had known Hal Cook several years. I roomed at the same place he did one time. I would say that his age was around twenty-five; something like that. He was a little bit heavier built, I believe, than I am, and not quite as tall. Ever since I knew him he was a good and healthy, strong man, able bodied man. He worked all the time in the automobile plant of the Ford Motor Company. I never did know him to leave there sick or anything at any time. He was always healthy and worked every day that he possibly could. [fol. 30] I do not think Mr. Cook worked any at all subsequent to the time about which I have just stated when he was there on the boat.

The Ford Motor Company did not ask the men if they desired to do this extra work unloading these boats. They compelled us to do it. At one time they said the men that did not work on the boat did not have any job. It seems like they laid off a boy about a week because he was not there, a fellow by the name of Bradley. I went out there and unloaded those parts because they told me to go. I did not care for that kind of work. Naturally unloading those boats, that is a different kind of work from what I would like to do.

My regular employment was at the plant of the Ford Motor Company. I worked there about three years, I guess; something like that.

Cross-examination.

By Mr. Hightower:

All of us unloaded boats for the Ford Motor Company *Company.* We were required to do that under our contract of employment. That is correct. Each and every man under his contract of employment unloaded boats for the Ford Motor Company. We had unloaded several boats before that. I do not remember how long it had been from the time we unloaded other boats. I did not keep track of that.

It seems like the boat Mr. Cook and I were working on was the Lake Gorian. I am not positive, but it seems like

we started unloading the boat that night some time and worked through the night.

It was after we had worked there several hours that he complained that his back was hurting. We had been work-[fol. 31] ing there quite a while when he left the ship. I could not say just how long it was. It had been so long since this happened I could not give you an idea in hours.

I could not say what size ship that was. It was a pretty good size ship.

Mr. Cook at no time ever told me that he injured himself in any manner, shape form or fashion. After he worked down in the ship a while he just complained that he was sick and that his back was nearly killing him. Then after he started complaining he would hold his back with his hands every time he had a chance. I do not remember that he said his back was nearly killing him, just that way, but he said he was hurt or his back was hurting him, something like that. I could not say just what he said.

That is my signature. I made that statement and swore to it. That is correct the best I can remember. Since refreshing my memory by that statement, just like I say, I do not remember Mr. Cook saying anything but just what I have said before about his back hurting him. It seems to me like he said that he was sick and that his back was nearly killing him. He did not at any time that I remember ever tell me that he had received an injury to his back. I made that statement something like this: "We began working in the same hold when we started work. Some time after we went to work Cook told me that he was sick and that his back was nearly killing him." I remember them taking a statement from me at the plant just after it happened. I guess that is what Cook told me. I could not say it was not because it was fresher on my mind then than it is now. It was shortly after the death in April when I made that statement. My mind was more active of course then in regard to the facts than it is now. I do not believe he ever told me at any time that he injured himself. He went on out and we did not have to stop and talk.

[fol. 32] By the Court:

My regular work is on the line. When a ship comes in we go down and unload it. The part of the ship we unloaded was full of freight cargo, Part of it was for New Orleans.

It was all cargo for the Ford Motor Company. I never went in the other end of the ship. The work of unloading was done by the regular men. It was not done by the stevedoring crew at all. It was done by the men there at the plant. The stuff was lifted out of the ship by tackle. It was ship's tackle that we used. The ship's officers were not in charge of us in getting it out. The man in charge of us was a man working regularly at the Ford plant.

We were not paid any different or any more for that. We were just paid straight by the hour, just like we were at the plant. They just took us down there and unloaded the boat, and then we went back to the plant and went to work at the plant.

Redirect examination.

By Mr. Polk:

I was working at the Ford Motor Company at the time Mr. Hightower just asked me about.

When I made that statement I do not remember whether they took down my exact words. We talked about the work, and some fellow -rote [wrote] it down. I think that was some man representing the insurance company. The fellow asked me questions and I answered what I knew, and the other man would write it down.

[fol. 33] Dr. Raymond Dawes, a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

By Mr. Polk:

I am Dr. Raymond Dawes. I am a graduate of Dearborn Medical at Chicago. That was an accredited School of medicine at that time. It is not in existence now. It is P and S. I graduated from that school in 1907. I have been practicing the profession of medicine since that time. I have been engaged in the practice in the city of Houston since the fall of 1913. I have been in the general practice.

I had occasion to wait on and prescribe for Hal Cook in 1927, some time about January of that year. He was suffering a good deal of pain. He came to my office. I have a

copy of the prescription that I gave him. That is a copy of the prescription that I wrote for Mr. Cook when he came to see me. He was apparently suffering pain at the time he came to see me. He seemed to be suffering severe pain in the back here. I prescribed for him on that occasion. That was the thirtieth day of January, 1927.

The purpose of that prescription was to relieve his pain. I did not undertake to make a thorough examination of this man. I do not believe I saw him after that date. I just gave him a subsequent prescription for the same thing. The date of that prescription was February 1, 1927. It was an exact copy of the other prescription. That was two days after the first one.

Cross-examination.

By Mr. Hightower:

The date of the first prescription was January 30, 1927. I made just a cursory physical examination then; just felt of him, and then I took his history and asked him about his [fol. 34] pain in that way. The pain was so severe he said he could not stand it. I did not take his shirt off or his underclothes. That was not necessary in that case. All I wanted to get at was something to relieve the pain. The medicine I gave him was for the sole purpose of relieving pain. I never made any physical examination to determine any objective symptoms. I only went by his statement to me and his appearance.

AGREEMENT AS TO CERTAIN FACTS

It is agreed by and between the parties hereto that the following facts are true and that it will not be necessary to offer evidence to establish said facts:

(1) That the defendant issued policy of workmen's compensation insurance to the Ford Motor Company, which was in full force and effect on January 26, 1927, and prior and subsequent thereto, which covered the employees of the Ford Motor Company within the scope of the Texas Workmen's Compensation Act, and only such employees

as were within the scope of the Texas Workmen's Compensation Act.

(2) That the claim for compensation was filed within six months after the alleged injury, and notice of injury given within thirty days, and that all preliminary steps with respect to notice of claim, awarded by the Industrial Accident Board, notice of appeal and appeal were properly perfected within the terms of the Workmen's Compensation Act.

F. J. Reynolds, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is F. J. Reynolds. I live here in Houston. I am employed by the Ford Motor Company as chief clerk. I have been in that position four years.

[fol. 35] Hal Cook was an employee of the Ford Motor Company during part of that time. He was employed by the Ford Motor Company July 10, 1923. He remained in the employ of the Ford Motor Company up until about January, 1927.

I have the record of the ships that brought parts to the Ford Motor Company at Houston, Texas, from Detroit, Michigan. There were two boats, the Steamship Oneida and the Steamship Lake Gorian. The Oneida made five trips and the Lake Gorian made two. They made seven trips in all. The Oneida came here first. The date of her first trip was December 20, 1924. Subsequent to that time she came in January 18, 1925, and February 20, 1925, and March 23, 1925, and September 7, 1925. That is the Oneida.

The Lake Gorian came in December 16, 1926. Her next trip was January 26, 1927.

No other boats have come in subsequent to that time. The Ford Motor Company owns those boats. Those boats did not bring any other cargo to Houston other than material or parts for the Ford Motor Company for Ford automobiles.

The first boat was unloaded by Ford Motor Company employees. All those shipments were unloaded by Ford Motor

Company employees, according to my recollection. The first ship was unloaded by Ford men, and, as I said, as far as I can recall all of them were unloaded by Ford men.

Hal Cook received four rates of pay out there. The first rate was 62½ cents an hour, and he was advanced to 75 cents an hour, advanced to 80 cents an hour, and advanced to 85 cents an hour. He was receiving 85 cents an hour at the time of his last employment. He had been receiving that rate since December 9, 1926. Those men were paid the same rate of pay for unloading those boats down there.

We were working the men in two shifts, and when they were sent to work down there, instead of reporting at the plant the men were instructed to report to the ship.

[fol. 36] Mr. Cook worked at the plant on the day of the twenty-fifth eight hours. I cannot tell from this card when he started to work on the twenty-fifth. I do know he worked twelve hours on the twenty-fifth.

AGREEMENT AS TO CERTAIN FACTS

It is agreed by and between the parties hereto that Hal Cook was receiving a salary at the time of his death that would entitle him to receive the full compensation allowed by the Workmen's Compensation Law, if he is entitled to recover.

When a man is employed by the Ford Motor Company he signifies by signing an employment slip that he is open for any kind of work. That did not necessarily mean any kind of work around the plant. That meant any kind of work within the jurisdiction of the Ford Motor Company. If they wanted to send him out on the road they had the right to do that.

Cross-examination.

By Mr. Hightower:

The home office of the Ford Motor Company is at Detroit, Michigan. It has two boats of its own, the Lake Gorian and the Oneida, that it has owned since 1924. It uses those

two boats on the high seas plying from their home port of Detroit, Michigan, to any of its various branch plants. Those boats were used for that purpose in the winter of 1924. I mean as far as southern trips are concerned. In the summer they were used for the same purpose in the north. They came to Houston. They were used exclusively and continuously by the Ford Motor Company on the high seas.

This ship was anchored at the municipal docks. The Ford Motor Company did not own the docks that that ship was tied into. Other ships would berth there and unload [fol. 37] cargo, other ships engaged in international commerce and navigation. I do not know the number of the dock this ship was tied up to.

It was a part of Mr. Cook's employment and a part of his contract of employment to assist in unloading cargo off these ships, and he did perform that service for the company. I do not know if Mr. Cook performed that kind of service on the trips of the Oneida, but he handled that kind of work on the first trip of the Steamship Lake Gorian, and also on the second trip of the Steamship Lake Gorian.

Those were self propelled ships. The crew of the ship was in the employ of the Ford Motor Company. There were captains and mates and such as that on those ships, who were in charge of the ships. They were in charge of both ships while they were in Houston, and had charge of the cargo, getting them unloaded and returning with the ships to the home port of Detroit.

Redirect examination.

By Mr. Polk:

The foreman was sent along in charge of those men when they went from the plant.

Mrs. Myrtis Cook, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is Mrs. Myrtis Cook. I live at 323 North York Street, Houston, Texas. I am the wife of Hal Cook.

Mr. Cook died March 28, 1927. Mr. Cook and I were married on February 7, 1925. We have one child. That child is a girl, and she is two years and five months old. [fol. 38] I am employed now. I work for the Star Engraving Company, in the stationery department.

I recall the circumstance of Mr. Cook's going to work on the night of January 25, 1927, to unload this boat down there. I met Mr. Cook at the Ford plant at 4:30 that afternoon. That was the time the employees got off. Then we went home.

When I met Mr. Cook he said he had to go back to work at 12:00 o'clock. In preparation for going down to the boat that night he went to bed and set the alarm clock. He got up at 11:00. He got up at 11:00 so he would have time to take me and the baby over to my mother's and then go to work.

Mr. Robertson and Mr. Simmons were going with him that night. Mr. Robertson is now dead. Mr. Robertson is the man who, with his wife, was drowned last summer.

I next saw Mr. Cook the next day at 12:00. He came home. He came home that day in pain with his back. When he got home he lay on the bed. He ate very little dinner. He complained all afternoon, and he wanted to go back to work that night, and he set his alarm to get up again, but he did not sleep any, and he did not go back to work. When 11:00 came he was not able to go. He never did go back to work after that night.

The first time he went to see a doctor was a few days after that. I do not know whether he went to see the Ford plant doctor before he went to see Dr. Dawes or not. The Ford Company had a doctor there at the plant. He had offices there at the plant for the purpose of rendering first aid to the employees. I do not know whether Mr. Cook went down to see him or not. I do not remember whether he went to see him before he went to see Dr. Dawes or not.

I took Hal to Dr. Dawes in the car. I heard Dr. Dawes testify about him being there on January 30. I took him [fol. 39] down there at that time. Mr. Cook was suffering at that time and getting worse. He was suffering pain mostly in the back, and pains in the front part of his body. He could not sleep during that time unless he had narcotics from the doctor. When he got this prescription from Dr.

Dawes he was able to sleep when he was under the influence of it. It was then necessary to get another prescription because the first one was not doing him any good after he took it a while. It did not relieve his pain, and so the next day, I think the first of February, a few days later, my brother-in-law and I went to Dr. Dawes and got a prescription, a double prescription. He said it was stronger.

Dr. Whitehouse, the Ford Plant doctor, came out to see Mr. Cook, but Hal went to him first.

An examination was also made of Mr. Cook by Dr. Hill down town here. Dr. Whitehouse sent us up there for that examination. He just wanted Dr. Hill to examine him. Mr. Cook could not drive the car. I helped him to the Post Dispatch Building. That is where Dr. Hill's office is. He had to be given some support at that time. I helped him. He complained of suffering at that time.

Dr. Whitehouse had told Hal he wanted to take him to Jefferson Davis Hospital and operate on him varicocele, varicose veins. Dr. Hill examined him and told him that was the best thing he could do. After that examination I took him back to Dr. Whitehouse. Dr. Whitehouse told him he could not give him anything until 4:30. He said if he would go on home when he got off at 4:30 he would come by there and give him a hypodermic and ease him until the next morning. He was going to take him to the hospital the next morning.

We did not go to another doctor until after Dr. Whitehouse came by that evening. Then we went to another doctor. We went to Dr. Carl F. Barnes. His office is in the [fol. 40] Kress Building. We called Dr. Barnes that night and he came out early the next morning. He said that he would operate on him at home, and that he would be back the next morning, but he came back in the afternoon. That was the same day, the eleventh of February.

He operated on Mr. Cook. He did not get better. He got worse. He was operated on on the eleventh day of February, and he stayed at home, and we took him to the Methodist Hospital on the first day of March. He was at home from the time of the operation up to the time we carried him to the Methodist Hospital. After he was operated on he was not up and could not walk. He got up in his night clothes, and his brother and I helped him in

the car, and I took him to my mother's because I did not want to stay there by myself with him. That was about three days before March 1, which was the time he went to the hospital.

He stayed at the hospital from the first day of March until the twenty-third day. We took him home then because he wanted to go home so bad, and Dr. Barnes said he could not get well, and so he let him go home. He died March 28. That was Monday morning, at 10:20.

I had known Mr. Cook two years and four months prior to our marriage. He was six feet tall and weighed 165 pounds. He was engaged in his employment continuously over there at the Ford Motor Company. Mr Cook was never sick while I lived with him prior to that time. He had a cold once in a while, but he never missed any work from being sick. Mr. Cook did not have any blemishes. He was in perfect health. I do not know of his ever being ill prior to the time I met him. He never stated that he had suffered any accidents or anything of that sort.

[fol. 41] I do not know what character of medicine was given him during all the time, both prior and subsequent to the operation for varicocele veins, and out at the hospital. All the prescription said was to relieve pain.

Cross-examination.

By Mr. Hightower:

My husband never got better from the time he was operated on up to the time of his death. He gradually grew worse from the time of his operation until his death.

J. A. Petrosky, a witness in behalf of the plaintiffs, testified as follows:

By Mr. Polk:

My name is J. A. Petrosky. I was employed by the Ford Motor Company in 1927. I had been employed there possibly about four years. I was working on the rear axle station on the line out there, the construction line, what they call the assembly line.

I knew Hal Cook. I worked about four cars from him on this assembling line, the width of four cars. He worked about four cars from me on a radiator station. I could not say what he had been doing on the crew, but he was working around the radiator station. He had been working there longer than I had. I worked there right around four years. He had worked there longer than I had. I knew him during most of the time I was there and saw him there while we were working. He was a man about six feet tall, and weighed about 160 pounds as close as I can remember. He was a pretty well built man. He never lost any time [fol. 42] from ill health or anything of that sort that I know of. He was always working and never complained that I ever heard.

On the night of January 25, 1927, I was called on by my employer to go down and unload a boat. I do not recall the name of that boat. I worked at the plant during the day. I quit work there at 4:30. I was instructed to go to the Turning Basin and unload this boat at 12:00 o'clock that night.

I saw Hal Cook there that night. He and I worked in the same hatch. That was number one hatch. That was in one end of the boat. I think there were four hatches on the boat, two on each side. Number one hatch is right in the head end of the boat. Number two hatch would be the closest to the shore. That would be more in the middle of the boat. The side of the boat was up against the wharf in that manner.

We were unloading all kinds of parts, axles, front axles, springs and small parts. There were also batteries in there, and rear axles. Those batteries were loaded four or five in a crate. I could not say how much they weighed. They would weigh approximately between 100 and 125 pounds. They were crated length ways, five batteries in a length. I suppose those rear axles would weigh about 200 or 250 pounds. It took two men to handle them, one man on each end of the axle.

Cook went in there the same time I did to work, and he stayed in there an hour or two hours, something like that, before I missed him, and he was complaining with his back. He said his back was hurting him so bad that he thought he would have to go home, and he went up to see

his boss. I heard him state that about his back hurting him. He was talking to me at that time when he complained [fol. 43] of his back. He was standing up there holding his hand on his back. He had both hands in the small of his back like that, and said his back was hurting him. He seemed like he did not have any get-up about him. He went on deck, and I did not see him after that.

I saw him after that before he died. I saw him at the hospital. I suppose that was a couple of weeks before he died. I could not state just when it was, but it was before he died though.

Cross-examination.

By Mr. Hightower:

I was working right there with him unloading that boat. The only thing I ever heard him say was that his back was hurting him. I never did hear him complain or say anything about receiving an injury of any kind or character. I never did hear him say that he received an injury of any kind or character while I was working there.

Roy Simmons, a witness in behalf of the plaintiffs, testified as follows:

By Mr. Polk:

My name is Roy Simmons. I live here in Houston. I am employed by the Gibralter Savings and Building Association. In January, 1927, I was employed by the Ford Motor Company. The nature of my employment was just general mechanical work. I was working on the assembling line.

I was from time to time stationed close to Hal Cook. I was stationed close to him in December and January prior to his death. It seems like we laid off on the day of January 25 and went down to the boat. I do not remember whether we worked that day or not.

[fol. 44] Mr. Cook and Mr. Robertson and I went down to that boat together. We went in Mr. Cook's car. Mr. Cook did not complain going down there that night of any injury

or anything of that sort. He seemed to be in his usual good health and good spirits.

After we arrived at the boat I did not work in the same place Mr. Cook did. I worked in a separate hatch. I next saw Mr. Cook after we had gotten down there after we had gotten off at 12:00 o'clock the next day. Mr. Robertson and I came back with Mr. Cook.

I went back to the boat that night myself. I was to come by in my car after Mr. Robertson and Mr. Cook. I was to go back with them the following night. I went by Mr. Cook's house that night. Mr. Cook did not go with me. Mrs. Cook came to the door and said Mr. Cook was not able to go; that he was complaining about his back.

Mr. Robertson and I then went on down to the ship. We worked after we got there. I believe we worked the whole shift. I think we both did. I am sure we did.

I never did see Mr. Cook at work after the time I have just mentioned. I went to the hospital to see him once or twice. He recognized me all right and spoke to me. That is after I had held my hand out. He shook hands with me, and I asked him how he was feeling, and he said, "Well, I am awful sick," and after that he turned over and apparently went to sleep, and I tip-toed out of the room.

D. H. Hotchkiss, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is D. H. Hotchkiss. I am superintendent of the Methodist Hospital, and have been for two years or more. [fol. 45] This is the permanent record of the hospital with reference to the case of Hal Cook. That is a complete record so far as we have it.

Cross-examination:

By Mr. Hightower: That is everything we have.

Dr. C. V. BARNES, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

I am Dr. C. V. Barnes. My profession is the practice of medicine and surgery. I am a graduate of the Memphis Medical Hospital, and Polyclinic at New Orleans. I graduated at the Memphis Medical Hospital in 1902, and at New Orleans in 1907 and 1910. I hold certificate of graduation from New Orleans. I have practiced my profession since the time of my graduation from Memphis and New Orleans. I have been practicing in the city of Houston six or seven years. I am in the general practice.

I was called to wait on Mr. Hal Cook. I do not remember the name of the street where I first saw him, but it was out toward the car barns. It was at his home.

The man was suffering excruciating pain when I saw him, pains that started somewhere in the abdomen and went downward and settled in his testicles. That is the way he expressed it. The left testical was affected. The testical was slightly swoolen [swollen]. There was a varicose condition in the scrotum.

I operated on him and removed a section of the vein. That operation healed up properly. I do not know how long it took for that to heal. It healed in about the ordinary time, seven or eight days; something like that.

[fol. 46] After I operated on this man I continued to go to see him. For about two or three days the man got relief. After that the pain came back just as severe as it ever was, if not more so. For about two or three days the man seemed to have gotten relief from that pain, but after that it was just as severe as it was before, if not more so. The man complained all the time of suffering pain in the abdomen; that is, somewhere in about this place, and that pain would go downward toward his testicle all the time. The pain he said would start on the inside and go down and settle in his testicle.

When I first made an examination of this man he was suffering pain. He told me at that time what he considered was the matter with him. He said he was working unloading some parts to a car, axles, if I remember cor-

rectly, and that he felt something give way on the inside of him, is the way be expressed it, and he suffered pain and felt fainty, and I think he told me he asked his boss something about it and he let him on some lighter work that night, and from then on he had pain. That is about what he told me.

Mr. Hightower: Your Honor, we ask the Court to instruct the jury that anything that the deceased told him as to how he might have been injured would not be admissible as evidence, but simply as the hypothesis upon which he might base a conclusion or medical opinion.

The Court: The jury has a right to consider the doctor's opinion in the light of what the man said occurred. The statement of the history is not independent evidence of the [fol. 47] fact. The matter will not be considered by the jury as evidence of the fact, but as evidence upon which the doctor based his opinion.

The Witness: After I had operated on him for this varicose vein and had removed it I found it necessary to remove him to the Methodist Hospital for the purpose of giving him better treatment out there and seeing him oftener each day. I suppose I saw him on an average of twice a day during the time he was out there. I think one day I went five times.

I was of the opinion that he was suffering from thrombosis of the mesenteric vessel, a blocking of the mesenteric vessel that supplies the parts on the inside. Thrombosis means a clotting or blocking. The mesenteric veins supply the intestines and supply the parts on the inside of the body. That is a part of the circulation system on the inside of the body. By thrombosis of the mesenteric veins I mean a clogging up of those veins.

The man finally died, of secondary enemia. That enemia is a breaking down of the blood cells, the life giving cells that supply the body. That is about as plain as I can make it. Very likely that thrombosis caused this enemia, the blocking up of those vessels.

I cannot tell you what caused that thrombostic condition. My idea is that it was that strain, that lifting, just like the blood vessels anywhere else, in your head or any other part of your body. That is my judgment, that it was a ruptured blood vessel.

A strain, something like that, lifting, will cause varicose veins. That is one of the most prevalent causes.

My treatment for this man was to give him something to ease him. I am not sure whether he had any X-ray pictures made of him or not. I do not think we did. I do not [fol. 48] see anything about them. An X-ray picture is useful in case of a fracture or a bone and in other cases. It would not indicate a blood clot unless it were stained with something. I do not see any X-ray pictures on this chart. Blood counts were made. There were five blood counts made. The percentage of blood was down to 48 of the total volume of the blood, based on a full amount of 100. 100 is figured as standard. That was on March 11. That indicates that the red corpuscles were breaking down. That was the last pathological test that was made on the percentage of the blood.

When a man loses blood he becomes pale and becomes slightly jaundiced or yellow because he has not enough red blood cells to make the red color. He loses weight.

This patient continued to lose weight. He was not weighed, but he continued to lose, by the looks of him.

The record shows that he stayed there from the first of March until the twenty-third of March. It was my judgment when he went home that he could not get well. That was my idea about it. He died fifteen days after that.

I did not see him from the time he left the hospital until he died. The undertaker called me to make out the death certificate. I never saw him after he left the hospital.

I presume these hospital charges here are reasonable. Three dollars a day for that charge there is a reasonable charge. I prescribed a lot of drugs and medicine for him to take out there. There were not so many bandages. He took quite a number of hypodermics. There were surgical dressings and things of that sort. I could not tell you a thing in the world about the charges for pathological tests.

[fol. 49] Cross-examination.

By Mr. Hightower:

It is my conclusion that following this operation a blood clot was torn loose and went into the mesenteric veins, from secondary anemia. I operated on him for what is

commonly known as varicocele. That is the big vein leading from the scrotum up.

All the veins in a man's body lead toward the heart. I operated on the varicose vein down in the scrotum.

The spermatic vein is one of the veins supplying the spermatic cord. It leads from the scrotum up. That vein goes into the vein leading right up there. It goes into the general circulation. The vein goes from the scrotum where I operated on up and goes into the renal vein finally. The spermatic vein is the one that leads from the scrotum where I operated on Mr. Cook on up directly into the renal vein. The renal vein leads into the vena cava, a large vein that leads up into the right heart. After it gets into the right heart it is pumped out then into the lungs, and then after it starts back out of the lungs they branch off again.

On the chart you have there the spermatic vein is accurately drawn, going on up and going into the renal vein. The vena cava is shown correctly there going upward. That is a correct sketch. That goes into the general circulation.

When this man came to me he had varicocele. I could absolutely tell from my diagnosis that he was suffering from varicocele.

Different things cause varicocele. Anything that will block up that vein will cause varicocele. Anything that will block that little channel that the blood goes through will cause varicocele or that varicose condition. The vessels become hard and the channel becomes smaller. It [fol. 50] does not make any difference what produces the smallness of the channel, if the channel gets smaller it is going to stagnate.

I understand hemorrhage of the tissues, blood getting out in the tissues.

The veins leading upward toward the heart get larger and larger. Following this chart, if an embolus were torn loose down here as I have stated to the jury it would start up in that spermatic vein. It would go on up that spermatic vein and go into the renal vein. That vein, as it leads on up, gets larger. An embolus would not get to the heart through that. I am of the opinion that an embolus would not go through a kidney and go through the heart. In all probability it would stop somewhere up in here. I know the spermatic vein leads directly into the

renal vein. It leads on into the kidney. As it goes up toward the renal vein the spermatic vein gets larger.

If an embolus were torn loose down in the varicocele vein its course would go up through the spermatic vein. As it went up that vein in the general direction of the heart that vein would get larger. It would be larger where the spermatic vein went into the renal vein. The renal vein is larger than the spermatic vein. The renal vein then leads into the vena cava. The embolus then would have freer transportation and a freer course from the renal vein into the vena cava than it would in its beginning down here. When it got into the vena cava, the large vein there, it would still have a freer course because the vein would be getting larger all the time.

The veins leading from the right heart are the pulmonary veins.

The embolus that we have traced would have a larger course all the time until it got into the right heart.

[fol. 51] I did not say in the first place that this thrombosis got into the mesenteric veins. I do not think I testified that. A thrombosis is stationary. An embolus is something that is washed off from a thrombosis. An embolus floats in the blood vessel and a thrombosis does not. A thrombosis is a blo-d clot which is stationary.

This man's red blood percentage before I operated was 82 per cent. I had no blood count immediately before the operation. That was when he went in the hospital. I operated on a man without knowing his blood count. That record does not show the blood count of Mr. Hal Cook before he was operated on. It is not almost imperative to take a blood count of a man before you operate to determine whether or not there is any primary trouble. That is at the option of the doctor.

Before I operated on this man he was complaining of suffering pain. He was complaining of pain in the abdomen, abdominal pain. He also gave me a history of how he was injured. I operated on him for varicocele without determining whether or not there might be a thrombosis of the mesenteric veins.

By secondary anemia I mean coming on after some other trouble, following in the wake of some other trouble. The secondary anemia came on a few days before his death.

I do not have any record of when I first examined him. It was a few days before he went to the hospital. I operated on him the next day after I examined him.

I think I have seen in the text books that a strain will produce varicocele. Where we have a varicose condition we may not have an acute condition at the time. A direct blow that would produce thrombosis would produce peritonitis in all probability. You might have gangreen-. If a man should receive a strain that would produce thrombosis very likely it would be sudden and severe. If he had a [fol. 52] direct lick sufficient to rupture the mesenteric vessels there is no doubt but what it would bring about acute peritonitis. If he had been struck in the abdomen or something like that he would very likely have had peritonitis following, but he would have to get an infection from somewhere to get peritonitis.

Thrombosis is a blood clot. That is all there is to it. There are several ways it can be brought about. A hypodermic injection in the vein can cause thrombosis. I say that a sudden strain can cause thrombosis of the mesenteric veins. I do not believe it will hold true all the way along the line that a sudden strain sufficient to produce thrombosis of the mesenteric vein would cause an acute peritonitis in four or five hours. It can cause it, but you have got to get infection there. If you have any medical authority that teaches differently I would like to see it. I will not put myself up against a medical authority. It [if] it is in the book I will take it in preference to my own opinion.

This chart indicates that Mr. Cook's temperature became elevated after the operation. Temperatures are usually caused from infection. That would indicate that following this operation infection set in.

In the death certificate I say that the primary cause of death was secondary enemia. That is loss of red blood corpuscles. It is a breaking down of the red blood corpuscles. Anything that will lower the vitality of the body could have a connection with secondary anemia. Infection following this varicose operation would cause secondary anemia, but he was not infected. It would cause it. The chart indicates that there was infection somewhere within that body.

I cannot say whether an injury of any character had anything to do with this death. I cannot say that it was the

cause of it or was not. I only took the history of the man.

[fol. 53] Redirect examination.

By Mr. Polk:

Assuming to be correct what the deceased told me, that he was lifting something out there on this boat, and that he felt something tear loose inside, and that was the history of the case so far as I knew it, it would logically follow as a pathological proposition that this could happen.

The primary healing of that operation was all right. It healed up primarily just like all wounds heal up. I cannot see why that could have caused this condition. I cannot see any reason why it could have.

It would be my diagnosis that this strain was the primary cause of this man's condition, that he did rupture one of those vessels—which one I do not know—but he had symptoms of a ruptured vessel.

This man had hemorrhages during the time I was waiting on him out here at the hospital. He had hemorrhages through the bowels. That would logically follow the rupture of a blood vessel inside.

During the time this man was in the hospital I called in other physicians in this case in consultation, Dr. De Walt and Dr. Kuebler, and Dr. Hayes, and Dr. Priester saw him. I called them in because it was an unusual case to get their opinion. After having those consultations with those doctors I did not have any reason to change my treatment of this case.

By the Court:

Anemia does not mean to starve to death. It means to starve to death, but not for lack of food, but because the body was not properly performing the function to take out of the food the nutritive value and spread it through the [fol. 54] system. It is not starving in the sense that the body could not get food, but in the sense that the body could not use the food. That condition that I called secondary anemia was just the days before he died. His body was just breaking down. We did not find any typhoid. My diagnosis was that he did not die from any of the different germs or different cocchi.

The condition I operated for was simple varicocele. I never heard of anybody dying from varicocele. It is an enlarging of the veins that supply the testicles and makes a knotty growth around the vein. A strain, standing on the feet and such as that might cause it. Over sexual indulgence or sexual abstinence might cause it. I do not know that I ever saw any text books on that, but I think it would have some bearing on it. The varicose veins that you have in your legs are not any different, only in a different place. You can get varicose veins from a strain or standing. When you find varicose veins it is ordinarily a condition of long standing. About 60 per cent of the men have varicose veins.

I believe from this history this man gave me he had a ruptured mesenteric vessel. There is a difference between a ruptured mesenteric vessel and varicocele. They are different veins altogether. He had varicocele, and I think he had this other besides. I really do not think the varicose condition had anything to do with his death. I think it had nothing whatever to do with his death. It was not sufficient to cause his death, unless by reason of the operation he got some infection, which he did not get. I do not believe I ever heard of a man dying from an operation for varicocele.

I determined that there was apparently a th-omboid condition there from the history of the case. The man gave a history of a fainty condition when he first became injured, [fol. 55] got fainty and thirsty for water, like anybody who has lost blood, and I connected that up with the instant pain that he had, radiating down in the pelvic region, following where those vessels would go.

I would not think that varicose condition had anything to do with that. That was just a coincidence, something coming along with it. That is what I think about it.

His temperature rose just about the time he was passing blood. His temperature came up when he was passing large quantities of blood. My deduction is that that was caused from severe inflammation of the bowel wall, the little capillaries supplying the bowel becoming so saturated and breaking through and filling the bowel[l] [bowels] up with blood. That was about ten days after he claimed to have been injured. That is one reason that I made the diagnosis that I did. The blood vessels dam up and that is nature's

remedy to try to relieve the congestion. That is my belief about it.

If he had not given any history of having received any strain at all I would have said I did not know what in the dickens was the matter with him. When he gave that history of a strain that made a satisfactory reason for the conditions I found. It does look like to me, with a man giving a history of lifting something, turning sick at the stomach, fainty like, and wanted water and had to have water right away, there was something happened like the rupture of a blood vessel and loss of blood. That is the way it looks. That is the history I took of him.

[fol. 56] Recross-examination.

By Mr. Hightower:

The thrombosis would not happen right now. It could not come on directly because the blood has got to have time to clot. There is no way in the world to tell how long it would take.

A blood clot of the mesenteric vein would not stop the entire flow of the blood. It will get enough lodged somewhere and it will become decomposed and make a blood clot. That is my idea of that.

I operated on that fellow directly after I saw him, I believe the next day, and, just as I said, I doubt very seriously whether this varicose condition had anything to do with it. If this man had received a thrombosis of the mesenteric vein on January 26, and it was over a month thereafter when I saw him, I would have had difficulty in diagnosing that, because you do not possess an X-ray eye and you cannot see all those things, and that is the reason you cannot know just exactly. You can only go by the symptoms of the man. That is all in the world you have, and that is the reason why you would not know just exactly. You can only go by the symptoms. You cannot see it, and you cannot feel it, and that is the only way you can tell.

There is no certain time that it takes secondary anemia to set in. Anything that decreases the blood supply causes anemia. If you have fever five days you are going to have anemia.

By the Court:

There is no set time that it would take a case of pernicious anemia to develop from the condition that I saw this [fol. 57] man suffering from. Some of them will break up faster than others. It depends upon the constitution of the patient largely.

Redirect examination.

By Mr. Polk:

When I first saw this man he was not a strong man. He was in a fairly well nourished condition though the first time I saw him.

H. O. WINDELL, a witness in behalf of the plaintiffs, having been duly sworn, testified as follows:

By Mr. Polk:

My name is H. O. Windell. I live at 503 North Hutchinson street, here in Houston.

I knew Hal Cook in his lifetime. I had known him a little better than four years before his death. I was not related in any way whatever to Mr. Cook. I am related to him by marriage. He is my wife's sister's husband. Cook and I married sisters.

Mr. Cook was very healthy while I knew him. I never knew him to be in any other but good physical condition prior to the time of his last illness.

I saw Mr. Cook the very day after the accident, the very evening of the accident. He was at 110 North Estelle Street then, at his home. On that occasion when I saw him he was in pain. I stayed there that night nearly three hours, or a little better.

I am employed by the Southern Pacific. I have not been employed by the Ford Motor Company.

[fol. 58] I saw him very often subsequent to that first time I saw him. I was living about seven or eight blocks from him at that time. It was my custom to see him every evening after I got off from work.

I could not give you the correct date when he was taken to the hospital. I saw him out there every evening. When

I saw him the first evening after the injury he was suffering. He was suffering every time I saw him. He was being given medicine to relieve his pain. I could not swear what kind it was, but it was medicine to relieve him, I know. I know that it was given to ease him because a number of times I was there they gave him a hypo.

I went and got some medicine for him. I got the prescription from Dr. Dawes and went to the pharmacy and got the medecine for him.

I saw Mr. Cook after he was brought home from the hospital. He was very, very low at that time. He was pale, very pale, and seemed to be sick.

I saw Mr. Cook about two or three evenings before the twenty-sixth of January. I was not at his home. I saw him at his father in law's, at my father in law's house. He was feeling fine at that time, before the accident. He appeared to be physically in good condition. He did not complain of any injury at that time.

Ordinarily I saw him two or three times a week, I suppose, before he was injured, and then some. I never heard him complain of any injury before this particular time. I was not what you would call a real personal chum of this man before he married my sister in law, but I saw him a number of times and had conversations with him quite often. Subsequent to his marriage to my sister in law I was with him a good deal. I have been on outings with him a number of times. I have been with him going in swimming. [fol. 59] I have been in swimming with him in Spring Creek. We did not have on bathing suits. I saw Mr. Cook there stripped. I did not see any defects or anything of that character at all about him. He was a very good swimmer.

I never did work with him, except repairing cars around home. He was a mechanic and I was a mechanic too. The only work I ever did with him was around home repairing cars. He was vigorous and strong.

Cross-examination.

By Mr. Hightower:

I never did work with him at the Ford plant. I never did see him doing any work at the Ford plant. I never did

see him unloading any boats at the municipal docks. I never saw him receive an injury of any kind or character in my whole life. In referring to an injury I am just simply referring to something that I heard.

J. A. PETROSKY, a witness in behalf of the plaintiffs, recalled, testified as follows:

By Mr. Polk:

I considered that work down there unloading those parts heavy work.

I stated that when I went down there and started to work that night Hal Cook was with me. It was about two hours before he slacked up on his work. I could not tell the difference in his work until then. From that time on up until he stopped I could tell a difference in his work. After the two hours he complained of his back. From the beginning up until he complained of his back he was all right. Before that time I could not tell any difference in him, that he was hurt or anything.

[fol. 60] I lifted some of that material with him. We were lifting rear axles, truck axles and also touring axles. Those things were stacked four this way and four that way. They were stacked from the bottom of the boat to the top, just as far as they went, axles, and different things on top, small parts. As far as I recollect, there were small axles first, and then truck axles, and then small parts. In getting out that stuff we had to be on top of those axles and had to lift them out. You had no room to stand straight up. When we lifted those axles we laid them in what they called a pan. We picked them right up by the side and put them in. We worked them down from the stack as we unloaded the boat. There was no lifting but just into the pan.

Lifting those axles and heavy weights was straining work. I handled those axles at the automobile line at the plant. There was once I slipped with one of those axles and it caused me an injury. We were carrying one of those axles up to the line, and there was some paint on the floor, and I slipped about a foot.

Cross-examination.

By Mr. Hightower:

I was working right there with Mr. Cook all the time that he was in the boat. I did not see him receive any injury of any kind or character. He just complained of his back hurting him. If he had slipped or fallen there I would not necessarily have seen it. I was right there with him, though, working on the same pieces with him. He did not state how he got hurt or anything. He just said his back was hurting him. That is all he told me.

[fol. 61] Redirect examination.

By Mr. Polk:

Mr. Cook and I were not working together in a pair all the time. There were six or eight of us in the hatch, and I would work a little while with one and a little while with another, and then maybe another fellow would grab hold with me, and just change about.

Recross-examination.

By Mr. Hightower:

That was ordinary heavy work.

Plaintiffs rest.

MOTION FOR INSTRUCTED VERDICT

Mr. Hightower: Your Honor, we would like at this time to present a motion for an instructed verdict.
The Court: I will overrule the motion.
Mr. Hightower: Note our exception.

W. A. TOLAR, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is W. A. Tolar. I live at 6608 Avenue F, Houston, Texas.

I have worked for the Ford Motor Company. I was working for the Ford Motor Company about January 26, [fol. 62] 1927. I assisted in unloading the ship Lake Gorian that was at the municipal docks about January 26, 1927. I was working in number two hatch and he was working in number one. I knew him. I was not working with him on that boat. I did not see him there at work. He was in one hatch and I was in another.

Cross-examination.

By Mr. Polk:

I had known Hal Cook about three or four years. I worked right by the side of him on the line. I would judge him to be about six feet tall and to weigh about 170 pounds. He was an unusually strong man.

Dr. Peyton R. Denman, a witness in behalf of the defendant, testified as follows:

By Mr. Hightower:

My name in Peyton R. Denman. I am a physician and surgeon. I am a graduate of the Medical Department of Tulane University. I have had post graduate courses in Polyclinic, New York, Mayo Clinics, and Chicago. I graduated from the medical school in 1903. I have been practicing my profession continuously since that date. I am practicing now in the city of Houston.

Assuming, for the purpose of a hypothetical question, that a young man, apparently in good health, was unloading a ship where he lifted heavy rear axles; and after he had been working there for about two hours or maybe a little longer he complained with his back, complaining that it was hurting him, and he continued to work on for about an hour, and left the ship; and he is not accounted for any more until that day at noon, when he went home and was complaining [fol. 63] of suffering pain; and later, about a couple of weeks, he was examined and it was found that he was suffering with varicocele; and he was operated on about the fifteenth of February for varicocele, and on the twenty-eight-

of March he died, the secondary cause being anemia; based upon that hypothesis I do not think the primary cause could have been thrombosis of the mesentary veins. You understand that is the venus supply of the intestines. Thrombosis is a blood clot, either in an artery or in the vein. The symptoms are violent and sudden cramping, pains in the abdomen, together with intense nausea and vomiting, and early symptoms of intestinal obstruction, as occasioned either by severe constipation or gas enlargement of the abdominal walls, due to gas in the intestines, and a bloody mucos discharge; and thrombosis in any of the mesentary vessels would immediately, or within a period of two or three hours, produce a definite and rapid gangreen of the section of intestine supplied by the circulation blocked. That may — anywhere from one inch to twelve inches, depending upon the size of the embolus. This rapid gangreen develops in from two to four hours, and these patients never live over two or three days unless surgical intervention is immediately instituted, and even in that case it is a most hazardous surgical procedure, and for that reason I would say in this case that had nothing to do with it. A man could not live through three or four days with an embolus of the mesentary veins.

An operation for varicocele or varicose veins would not result in thrombosis of the mesentary veins. That is due to a physical fact that varicocele is an enlargement of the mesentary vein. That is the vein that carries the blood from the spermatic cord upward, and the left mesentary vein empties into the left renal vein. The renal vain in turn empties into the vena cava. That is the large vein, the large [fol. 64] trunk that all the tributaries have emptied into, and from here that blood is carried into the right heart, and from the right heart into the lungs. The veins gradually get larger until they reach the heart, and then they leave the heart through one large vein, and that vein branches out into many fine capilaries in the lung, where the venus blood comes in contact with the oxygen of the air and is sent back as red blood. So an embolus torn loose from an operation for varicocele would take this course by the spermatic vein into the left renal vein, and through that into the vena cava, and from there into the right heart,

and from there into the lung, and would be a pulmonary embolism instead of a mesenteric. The right spermatic vein empties directly into the vena cava, and from there goes into the right heart. There is absolutely no connection.

An embolis is a portion of a blood clot that is broken off and is carried into the blood stream and continues in the blood stream until it reaches a vessel that is so small that it cannot go any farther, and there it blocks that vessel, and that is what we know as an embolis. A thrombosis is a clotting of blood within the vein at a given local point. Infection does not necessarily set up wherever you have a thrombosis.

I did not say a thrombosis resulted from a strain. Thrombosis usually follows an organic condition, anything which causes arterio sclerosis or hardening of the arteries and of the vessel walls, and a rupture of the *sam*ll capillaries or veins or arteries, due to the lack of elasticity; for instance, to illustrate, apoplexy in older men. Now it is possible to develope an embolus from a ruptured vessel. In those cases the symptoms are most grave and severe from the beginning.

There is no specific time a man will live after he receives a thrombosis of the mesentery vessels, but the authorities [fol. 65] state from two to four days, unless relieved by surgical intervention. If this man had received a thrombosis on or about January 26 I think it utterly impossible for him to have lived until March 28. That is because he would within three or four hours develop gangreen- of a definite section of his intestine, which would if not interfered with produce locked bowel, and he would have died from the locked bowel or intestinal obstruction. Whenever you cut off the blood supply you get gangreen-, and unless you can get in there and cut out that portion the patient dies very promptly.

Secondary anemia would not usually follow thrombosis. There is no connection. Secondary anemia is brought about conditions that absorb the red blood cells, or the homeglobin of the red blood cells, with more rapidity than it can be manufactured, for instance, following typhoid. Secondary anemia is a sympton. It is not a condition at all, and never primarily kills a man. The thing that produces secondary anemia is the thing that kills a man.

Cross-examination.

By Mr. Polk:

Taking a young man about twenty-five years of age, about six feet in height, weighing between 165 and 170 pounds, and this young man has been engaged for a period of three or three and a half years in doing heavy physical, manual labor, and is fully developed physically; and he goes to work one night at 12:00 o'clock, and up to that time there is absolutely nothing the matter with him at all and he has no trouble of any kind; and he goes to work, and in about two hours time he complains to his fellow workers that he is suffering a tremendous pain in his back, and he then does no more work, and goes on the deck of the boat, and then goes home a few hours after that; and he complains [fol. 66] constantly of this severe pain in his back; and then soon after that he goes to a physician and he tells him of the severe pain in his back, and the physician gives him something in the nature of a pain killer, a narcotic prescription, and he takes that narcotic to ease his pain, and he continues to require more and more of this narcotic; and this goes on for something like ten or twelve or fifteen days, and a physician is called in and finds a varicocele, and finds that an operation is necessary, thinking at the time the pain is caused by the varicose veins; and he is operated on and the operation is a success, and there is no come back, no infection of any sort, absolutely a clear cut operation, and he is relieved from the pain, but only for a very short while; and this pain is in the lower part of the opening inside of the human body in there, right around the cavities on the inside there, and he complains that the pain is very severe in there; and this continues and he is removed to a hospital, and gives a history there of having been lifting a heavy axle in the hold of this ship, when he feels something tear loose on the inside, causing the severe pain, and causing him to stop work; and this man remains in the hospital, and occasionally passes blood from the stool, and has a hemorrhage and discharge; and he stays there from March 1 to March 23, when he is taken home from the hospital in a very anemic condition, and on the twenty-eighth day of March he dies; I could not say what killed

that man, without further examination. It being further true that all the examinations were made for the purpose of eliminating the possibility of any of the cocchis of any sort or any infection, it is hard to state specifically, with such an imperfect examination of a patient, just what caused his death. I do not believe anybody could state that with any degree of knowledge from the symptoms that you have set forth in your question.

I did not know Hal Cook. I never saw him.

[fol. 67] By the Court:

According to the statement he had a lot of hemorrhage, I believe. That would indicate one of two things, that he had a- ulcerated condition somewhere in his intestinal tract, or he had ruptured an intestine. Now the symptoms of a ruptured intestine would begin by most violent pain, and would produce nausea and vomiting, and *and* immediately would cause peritonitis.

Taking just the matter of hemorrhage, I would look for just one thing. I would look first for a- ulcerated condition of the bowels to determine whether or not the patient had bleeding bowels, starting at the lower part to determine whether or not the patient had bleeding piles. Sometimes a case of bleeding piles will cause the patient to lose sufficient blood to cause this secondary anemia. If I did not find that condition I would do an examination with an illuminated instrument put into the man's colon, some three or four feet of his lower bowel, and then if that was negative, no ulceration, and he was still passing blood, with this negative history, and in the absence of any symptoms of peritonitis, mark you, I would order what we call a gastro intestinal X-ray examination. That is done by the use of a certain kind of meal, and with a flu-roscope you watch that meal go down, and it will definitely show any pathological condition in the stomach and intestines. I think in such a case that certainly would have been the procedure to follow.

An embolus that I have described would only stop one place, and that would be in the lungs. That would not cause a slow death. It would cause a sudden death.

It seems to me, from Mr. Polk's question, that the man had some condition within his intestinal tract that caused

hemorrhage, which produced the secondary anemia that both attorneys have asked me about. Then I would state that this man died from a condition within the intestinal tract [fol. 68] that permitted a continuous, daily hemorrhage, which produced secondary anemia, finally dying from actual weakness and loss of blood. I put as the seat of the trouble which caused his death the intestines. It appears from the questions asked that that is where the trouble was. It is my opinion, from the questions asked, that he suffered from some trouble within the interior of the intestines which gradually produced his death.

The intestinal condition had nothing to do with the varicocele. There is no connection. There is no way to tell what caused the hemorrhage.

If fifteen days after the injury he was treated with opiates to relieve his pain, and then was operated on for varicocele, the doctor stating that he seemed to be in fair physical condition, with no anemia; that he was complaining of pains down in his testi*cal*, which the doctor attributed to this varicocele; and the doctor operates on him and claims it was a good operation, and then after that he dies; and shortly after the operation his fever rises considerably, and then there was the setting up of what is called secondary anemia; that history is entirely negative.

I believe I endeavored to picture a perfectly normal, healthy individual, who received any kind of an injury to any of the contents of the abdomen. The very first symptoms he would have would be a violent cramp like pain in the abdomen. And soon following that, if not almost immediately, there is a nausea. That is true if you hit a man in the stomach with your fist. You knock the breath out of him and he turns pale and get sick at his stomach, and suffers cramps within the abdomen, and is never referable to his back. This man gave no such symptoms of trouble within his abdomen; and I cannot conceive of a traumatism of any kind unless it produces those typical symptoms, violent pains in the abdomen, nausea, vomiting, sick stom- [folfl 69] ach, and very soon peritonitis. Those symptoms are universal and are detailed by all authorities on this subject without any variation.

It is my opinion that that pain in his back had no connection with that intestinal trouble which he had at the time

of his death. He could have had some constitutional disturbance, anything to produce an ulcerated condition within the inside of his intestines. Those ulcers might begin to bleed slowly, as they always do, and produce these painful conditions in the back, and the patient becomes weaker and weaker and gets paler very gradually from the continued loss of blood. The most plausible theory, I think, is that he had an ulcerated condition of the stomach at the time he first complained, which would explain the pain in the back, and also later explain the loss of blood. To me that is the only reasonable theory that could be given; and this varicocele that happened along at the same time had nothing to do with it. It has no connection with either condition.

Dr. JAMES A. HILL, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is Dr. James A. Hill. I am a physician and surgeon. I am a graduate of Tulane University, Louisiana. I graduated in 1900 and have been practicing the profession continuously since. I have been practicing in Houston about eighteen years.

I made a physical examination of Mr. Hal Cook. That examination was made February 10, 1927, I think. I made a physical examination for an injury he was supposed to have had. I did not find any objective symptoms of an injury. He complained of pain in his groin that extended back to his back.

[fol. 70] He showed a slight mass of varicose veins along the left cord and upper portion of the scrotum, and he claimed it was very tender. I found absolutely no objective symptoms of any injury.

If at the time I examined him he had been suffering from a thrombrosis of the mesentary veins I think it would have been readily diagnosed. If you have a thrombosis you usually have an anemic condition following it, and you have very severe pains, and a man with thrombosis is extremely sick and one that is not able to walk around to your office.

I advised an operation for vericocele. That would not

be attributed in any way to any strain or injury of any kind. Those things are usually due to a pathological condition of the valves of the veins. In varicose veins the little valves become diseased, and the blood does not travel back in the normal way, and in that way the veins become dilated and enlarged and develop what we call varicose veins.

Cross-examination.

By Mr. Polk:

I do not think varicose veins are caused by injuries.

This man walked in my office. I do not know how he came up to the office.

Redirect examination.

By Mr. Hightower:

He was not in an anemic condition at that time.

[fol. 71] B. F. Teague, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is B. F. Teague. I am timekeeper at the Ford Motor Company. I have been timekeeper for the Ford Motor Company since about January 1, 1926.

I kept the time of a man by the name of Hal Cook who worked for the Ford Motor Company. He worked for the Ford Motor Company since some time in 1923.

I kept the time of the employees that were unloading the ship Lake Gorian of the Ford Motor Company on January 25, 26 and 27 or [of] 1927; that is, I kept the time on the night shift from midnight on the twenty-fifth until 12:00 on the twenty-sixth, and the next night the same time. That was the shift Mr. Cook was on. I kept his time. He started on the Lake Gorian at midnight of the twenty-fifth and he worked from midnight of the twenty-fifth to noon of the twenty-sixth. That is what I call the night shift. He worked that twelve hours. He left the ship at 12:00 o'clock the twenty-sixth.

He did not work on the twenty-seventh. I do not know whether he reported for work on the twenty-seventh. We did not use but half the crew that night. All of them were supposed to have reported, and the foreman sent them home, and so when I checked them over he was not there. He did not work that night at all. My records show that he was paid for an hour's work on the twenty-seventh. We pay everybody for an hour whether they work or not. I do not know whether he reported or not because I did not see anybody except the ones that were working, that actually stayed and worked; and everybody was paid for an hour that was on that job, even if they were sent home, for coming down there.

[fol. 72] I do know that he worked from midnight of the twenty-fifth to noon of the twenty-sixth, and was paid for that. I was right there at the ship. I made a trip through the ship every hour, or approximately that time. I tried to make it that much.

Mr. Cook never complained to me of receiving any injury or strain of any kind or character while working on the ship Lake Gorian. I was there, and they always reported injuries to me. The doctor was there part of the time, and he was the one who took care of injuries.

Cross-examination.

By Mr. Polk:

The night that I was there, on the twenty-sixth, the morning of the twenty-sixth, I recall seeing Mr. Cook that night, and then I checked them over every hour to see that they were there, and made a notation of everybody that was there. He was below, in the hold of the ship. I do not remember exactly whether he was there all the time, but that is where the work was. He had to go down in the hold to get to where they were working. I do not recall whether he was down there all the time.

Redirect examination.

By Mr. Hightower:

I was to check the time of everybody working in and about the ship there. I was to check everybody, whether

they were in the ship or on deck. I kept the check so as to know how to pay them.

[fol. 73] Recross-examination.

By Mr. Polk:

I do not know of my own personal knowledge whether he was down there the following night or not.

D. F. SHEPHERD, a witness in behalf of the defendant, having been duly sworn, testified as follows:

By Mr. Hightower:

My name is D. F. Shepherd. I work for the Ford Motor Company. I have been working for the Ford Motor Company going on twelve years. I have worked for the company in unloading the Lake Gorian. I was foreman of number one and number two hatches.

I did not hear Mr. Hal Cook complain of receiving an injury or strain of any kind or character while working on the Lake Gorian that I recall. I was there about the hatch all the time.

Testimony closed.

MOTION FOR INSTRUCTED VERDICT

Mr. Hightower: Your Honor, the defendant wants to request the Court to instruct the jury to return a verdict in favor of the defendant.

The Court: I understand you have written your motion to instruct.

Mr. Hightower: Yes, sir.

The Court: I will overrule the motion.

[fol. 74] Mr. Hightower: Note our exception.

CHARGE OF THE COURT

The Court: GENTLEMEN OF THE JURY: Under the rules of this Court the juror sitting in the first seat facing me is your foreman.

This case has come down to a very simple issue of fact; that is, the statement of the issue is simple. The evidence upon which the solution depends may be regarded as simple or complex according to how the jury looks at is. There is only one question for the jury to decide. I will give you two forms of verdict: one, "We, the jury, find for the plaintiffs;" and the other, "We, the jury, find for the defendant." Just select whichever one you find, and have your foreman sign it, and it becomes your verdict.

Under the statutes of the State of Texas there has been substituted for the old action for damages which existed at common law against an employer, where his negligence caused the injury to a workman, what is known as workmen's compensation, and these statutes fix the responsibility of the defendant and the rights of the plaintiff. These statutes provide that in case of an injury of an employee sustained in the course of his employment as the result of some accident, something unfor-seen occurring, that he may recover without proof of negligence a certain sum, so much per week, for injury, and so much for death.

The parties in this case have agreed that if the decedent, the man who is dead, came to his death as the result of an accidental injury sustained while he was in the dis- [fol. 75] charge of his duties of his employment that he shall recover the maximum amount stated in the statute, that is, his wife and child shall recover. If he did not receive such an injury they recover nothing.

Therefore, the simple question in this case is whether plaintiffs have shown you, as the law requires them to do, by a preponderance of the evidence that the deceased came to his death as the result of an accidental injury received in the course of his employment. If plaintiffs have sustained that burden your verdict should be, "We, the jury, find for the plaintiffs." If not, you should find for the defendant.

There is no question in this case about the fact that, the plaintiff being a widow with a small child, it is the natural inclination of a jury, as a matter of generosity, to find for the plaintiff. That is perfectly natural. We all recognize that. The defendant, Employers' Liability Assurance Corporation, is a company organized for the purpose of

writing insurance under the terms of the law, and there is no question as between the plaintiff and the defendant, if the matter were to be decided by sentiment, that the natural, human instinct would be in favor of the plaintiff; but of course this jury is not going to decide this case that way. A foreign corporation has the right to have its case tried fairly, and the Federal Courts are constituted for that purpose; so that, irrespective of personal feeling, the jury trying such a case will look at it as an abstract proposition, just as though the people in the case were dummies and the solution of the case was like a mathematical problem. You are not concerned with whether it helps or hurts the plaintiff or the defendant. You can't vote people's money that way.

It is conceivable that you would belong to the employing class which writes insurance, and that you don't think people ought to recover, and that you should write your ver- [fol. 76] dict on the theory that you wanted to discourage suits. That is not right either. You are solving this case upon the question, does the plaintiff show you, in considering this evidence, and balancing the evidence on the one side against the evidence on the other side, does the plaintiffs' evidence preponderate, that is, is the plaintiffs' evidence heavier, whether it makes the plaintiffs' side of the scale go down. Theoretically the scales are balanced like that, and if the plaintiffs put enough weight on that side of the scale to bear it down, so it looks more reasonable to you from the evidence that their theory is right than that the other theory is right, you will find for the plaintiffs; and if they do not do that you will find for the defendant. The law doesn't give her any advantage at all. In fact, the law puts a burden on her. The burden is on the man that sues to weigh down the scales in his favor.

You have heard the evidence. It is a case of circumstantial evidence. Nobody testifies that this man made an overlift. Nobody saw him make an overlift. There is no statement of his own before you that he did make an overlift. I explained to you in the course of the evidence that the statement he gave to the doctor can only be considered by you as part of the doctor's theory. The statement of the deceased, what the deceased told

them, was that his back was hurting him terribly and he thought he would have to quit. Plaintiff argues from that, here was a man claiming nothing the matter with him before in the course of lifting heavy weights, and that makes this an accident. They have one doctor who says the thing could reasonably have occurred just that way, and that in his opinion that is the way it did occur, and the other is a doctor who says the other. The defendant says the man never complained of any strain, never made any statement [fol. 77] to anybody that he was strained at the time of the injury, and never asked for any treatment, but went all the way along on the theory that something else was wrong with him besides the thing that is now claimed.

Those things are put up to you, and you must say whether the plaintiff establishes her case in your minds by a preponderance of the evidence. It is not like a criminal case, where it has got to be beyond a reasonable doubt. It is a question of whether her side of the case preponderates. The plaintiff has got to give you something to base your verdict on, and the defendant need only say that you haven't proved it, and if that is the case you can't find a verdict. You have got to be able to rest your verdict upon evidence that the plaintiff has given you, upon a theory she has given you of that death.

The man is dead. There is no doubt about that. He died from something. The plaintiffs says that he complained, and that their theory as testified to by their doctor makes a plain case that there was an accident, and the defendant says the contrary. You are to choose between those theories, with the obligation upon the plaintiff to make her theory more reasonable than the defendant's. If they balance you should find for the defendant. If you can't tell, find for the defendant; but if you can say that the evidence preponderates, overweighs, on the side of the plaintiff, then you will find for the plaintiff.

Are there any requests for the plaintiffs, or any exceptions?

Mr. Polk: Your Honor, I would like for the Court to charge just a little bit on that accidental feature of that.

The Court: What do you wish me to charge?

[fol. 78] Mr. Polk: Just that it need not be a physical trauma, but the happening of something unfor-seen, something along that line, it seems to me.

The Court: I said if in the course of a man's work he got a strain that is an accident. If the character of his work was such that he got a strain every day that would not be an accident. That would be a job. But a man don't go into work with the idea of getting a strain. If you get one it is something unfor-seen. If he got a strain as the result of lifting it is an accident. It is a question of whether he had an accidental injury. It means something in connection with the work he was doing which was not a part of the usual course of that work. If it is something that happens that is not for-seen that is an accident.

Any requests for the defendant?

Mr. Hightower: Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way of lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence.

The Court: I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got those strains every day.

Mr. Hightower: We except to the Court's charge in that respect.

[fol. 79] The Court: There is no evidence whatever in this case that the ordinary and usual course of that kind of business was for a man to be strained, and if he got strained it was necessarily something unusual, unfor-seen and accidental.

Mr. Hightower: I also want to except to the Court's charge with respect to no evidence being in there that it was ordinary or usual for that character of work to strain. The last witness, Mr. Petrosky, on re-direct examination testified that the parts were heavy and that it was straining work.

The Court: I don't mean to charge the jury the straining a man would do in the course of his work every day. I mean a strain in the sense of dislocation or severance or injury to some part of his anatomy. By strain I mean parting, severing or becoming injured as the result of the injury, as the result of that effort at lifting. That is a strain.

Any other requests?

Mr. Hightower: That is all, Your Honor.

The Court: All right, you can sign the verdict, and destroy the sheet you don't want to turn in when you sign it. If you find a verdict during the afternoon put it in an envelope and return to the Court in the morning at 9:00 o'clock to deliver the verdict in open court. We will stand adjourned until 9:00 o'clock.

[fol. 80] AGREEMENT RE BILL OF EXCEPTIONS

We, the undersigned attorneys for plaintiffs and defendant, here now agree that the above and fore- constitutes a full, true and correct statement of all the testimony introduced upon the trial of the above numbered cause, all exceptions reserved by the defendant during said trial, and a true and correct statement of all the proceedings had upon said trial; and we hereby approve the foregoing Bill of Exceptions.

Polk & Allen, Attorneys for Plaintiffs. Vinson, Elkins, Sweeton & Weems, Attorneys for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The foregoing Bill of Exceptions and statement of the evidence having been presented to me, and having been examined and found correct by me, is here now approved and ordered filed among the papers of this case and made a part of the record herein, the same containing all the evidence heard by the Court in said cause and a true and correct statement of all the proceedings had upon said trial.

Done at Houston, Texas, this 11th day of July, 1928.

J. C. Hutcheson, Jr., U. S. District Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR

Now comes appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, and in connection

with its appeal says that the judgment in said cause is erroneous and against the just rights of the appellant for the following reasons:

[fol. 81]

I

Because the alleged injury to deceased having been sustained on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service, the cause of action was exclusively within the maritime jurisdiction of the United States District Court, and therefore, the trial Court did not have jurisdiction to render judgment against appellant under the Texas Workmen's Compensation Act.

II

Because there is no evidence upon which to base a judgment against the appellant in that there is no evidence in the record that deceased, Hal Cook, died as the result of an accidental injury sustained within the course of his employment.

III

Because the evidence was insufficient to base a judgment against appellant in that the evidence is wholly insufficient to raise the legitimate inference that deceased, Hal Cook, died as a result of accidental injury sustained within the course of his employment.

IV

Because the evidence is insufficient to base a judgment against appellant in that there is no positive testimony in the record that deceased, Hal Cook, received a strain, and that he sustained a thrombus of the mesenteric veins, and it would be necessary to base a presumption upon a presumption to support the judgment rendered against appellant.

[fol. 82]

V

Because plaintiffs failed to discharge the burden of proof to establish by a preponderance of the evidence that the deceased, Hal Cook, sustained a thrombus of the mesenteric

vein as a result of a strain and that, therefore, the evidence was insufficient to support the judgment rendered herein.

VI

The Court erred in refusing to give the following instruction requested by the defendant:

"Right in that line, Your Honor, I would like for the jury to be instructed further that if in the ordinary lifting, in the ordinary way in lifting parts, he strained himself, that would not be an accidental injury within the Workmen's Compensation Act, but that an accident implies a sudden, unexpected and fortuitous occurrence."

because under the Texas Workmen's Compensation law a strain received in ordinary lifting by reason of the work itself where nothing happened or occurred suddenly, unexpectedly or fortuitously, it would not be a personal injury or accidental injury within the scope of the Texas Workment's Compensation Act.

VII

The Court erred in instructing the jury as follows:

"I will refuse the charge and give just the contrary. If in the course of the operation he lifted and got a strain it is an accident, unless he got those strains every day."

[fols. 83 & 84] because if the strain permits a recovery even though the deceased, Hal Cook, strained himself in the ordinary manner and way of lifting without the happening of a sudden, unexpected and fortuitous event and permits a recovery even though the deceased Hal Cook strained himself in lifting parts in the usual and customary way without any mishap or fortuitous occurrence.

Wherefore appellant prays for a reversal of the judgment of the District Court.

Vinson, Elkins, Sweeton & Weems, Attorneys for Appellant.

Supersedeas bond on appeal for $10,000, approved and filed July 11, 1928, omitted in printing.

[fol. 85] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 11, 1928

To the Clerk of the above Court:

Please prepare a transcript of the record in this cause, to be filed in the office of the United States Circuit Court of Appeals for the Fifth Circuit under the appeal heretofore allowed in this cause and include in the transcript the following pleadings, proceedings and papers on file, to-wit:

(1) Caption.
(2) Plaintiffs' Original Petition.
[fol. 86] (3) Plea to the Jurisdiction and Original Answer of the Defendant.
(4) Bill of Exception.
(5) Judgment of the Court and Verdict of the Jury.
(6) Motion for New Trial filed by Defendant.
(7) Order of the Court overruling Motion for New Trial.
(8) Notice of Appeal given by Defendant to Plaintiffs.
(9) Notice of Appeal filed by the Defendant.
(10) Petition for Appeal and Supersedeas.
(11) Order allowing appeal and superseding judgment.
(12) Assignments of Error.
(13) Supersedeas Bond on Appeal.
(14) Præcipe for transcript.
(15) Usual Clerk's Certificate.

Vinson, Elkins, Sweeton & Weems, Attorneys for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 87] Service of copy of the Directions to the Clerk for making up Transcript of Record on Appeal of said cause acknowledged this the 9th day of July, 1928, and we agree that the documents mentioned therein shall constitute the transcript in this cause.

Polk & Allen, Attorneys for Appellees. Sam C. Polk.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 88] Minute entry of argument and submission January 8, 1929, omitted in printing.

[fol. 89] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 5395

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Appellant,

versus

Mrs. MYRTIS COOK et al., Appellees

Appeal from the District Court of the United States for the Southern District of Texas

C. M. Hightower, Fred R. Switzer (Vinson, Elkins, Sweeton & Weems, on the brief) for Appellant.

Sam C. Polk and Ira J. Allen (Polk & Allen on the brief) for Appellees.

Before Walker, Bryan and Foster, Circuit Judges.

OPINION—Filed March 29, 1929

BRYAN, Circuit Judge:

This is an action at law, under the Workmen's Compensation Law of Texas, to recover compensation for the death of Hal Cook, an employee of the Ford Motor Company. The employee's widow obtained a verdict, and in pursuance of the statute, judgment was entered up against appellant upon its policy of compensation insurance.

[fol. 90] The Ford Motor Company owned a plant at Houston, Texas, for the assembling of automobiles manufactured by it. It also owned two steamships, The Oneida and The Lake Gorian, in which it carried its automobiles and parts thereof from Detroit to various assembling points, including Houston. The Oneida first came to Houston in December, 1924, and made four other trips to that port in 1925; The Lake Gorian came to Houston first on December 16, 1926, and again on January 26, 1927. The two ships were

unloaded on each trip by employees from the assembling plant without the aid of stevedores or longshoremen, in obedience to the directions of their employer. Hal Cook was one of the employees of the Ford Motor Company's assembling plant at Houston, where he worked as a mechanic from July 10, 1923, until January 26, 1927, when he was injured while assisting in unloading the Lake Gorian. He had assisted in unloading that ship on its previous trip, but had not helped to unload the Oneida on any of her trips. The injury occurred while he was in the hold of the ship attempting to lift a bundle of automobile axles. The evidence shows without conflict that he suffered a severe strain, was unable to work any more, and died two or three months later. Expert witnesses for appellant gave it as their opinion that Cook's injury was not the cause of his death, but there was sufficient evidence for appellee to support a finding that death was the direct result of the injury.

Appellant contends that the cause of action asserted is within the exclusive jurisdiction of a court of admiralty, and therefore cannot be maintained under the Workmen's Compensation Law of Texas. The martime law is not so exclusive as to prevent recovery under the workmen's compensation acts of the States in all cases of accident on navigable waters. In Southern Pacific Co. v. Jensen, 244 U. S. 205, it was held that "no such legislation (i. e. [fol. 91] workmen's compensation laws of the States) is valid if it contravenes the essential purpose expressed by an act of Congress or works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony or uniformity of that law in its international and interstate relations." But the rules of the maritime law may be modified by state statutes providing compensation for employees, where such statutes concern purely local matters and work no material prejudice to the maritime law. Grant Smith-Porter Ship Co. v. Rohde, 257 U. S. 469. The difficulty lies in applying these general principles to the facts of any particular case. The Oregon Compensation Act was held to apply and to afford an exclusive remedy in Grant Smith-Porter Ship Co. v. Rohde, supra. That was a case of a maritime tort of which the admiralty court would have had jurisdiction but for the state statute. The employee was doing carpenter work on the

vessel that had been substantially completed and had been launched on the Willamette River. It was pointed out in the opinion that the employer and employee had not "consciously contracted with each other in contemplation of the general system of maritime law," but had contracted with reference to the state statute; and it was held "that their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." The Texas Compensation Act under consideration here was held to abrogate the right to resort to the admiralty court in Millers' Underwriters v. Braud, 270 U. S. 59. That also was a case of a maritime tort which resulted in the drowning of a diver who was engaged in sawing off submerged piling which formed an obstruction to navigation in the Sabine River.

[fol. 92] The injury to the employee in the case at bar was not caused by a tort; it was a pure accident. Appellee could obtain no relief in admiralty, and has none unless it be under the Texas Workmen's Compensation Law. We are of opinion that the state statute applies under the peculiar facts of this case. As in the Rohde case, the employee and employer did not contract in contemplation of the maritime law. The employee's work was to be done upon land. It was only because he was directed to do so that he ever went aboard the ship. It would be extreme to say that he was a longshoreman or stevedore or is to be classed as a seaman within the meaning of §20 of the Merchants' Marine Act of 1920 as construed by the Supreme Court in International Stevedoring Co. v. Haverty, 272 U. S. 50. The work he did in unloading the Lake Gorian on her two trips to Houston was so infrequent and occupied so small a part of his time as to be merely incidental to his regular employment. The Ford Motor Co. owned but two ships which it did not use in commerce except to carry its own goods. The employees were not engaged to unload cargo generally, but only to take their employer's cargo off their employer's ship. We think it fairly can be said that the matter of unloading these two ships of the Ford Motor Co. at rare intervals was "of merely local concern, and its regulation by the state will work no material prejudice to any feature of the general maritime law." Millers' Underwriters v.

Braud, supra. It is true that in Northern Coal Co. v. Strand, 278 U. S. 142, it was said that the unloading of a ship was not a matter of purely local concern. But the language used in any opinion is to be construed in the light of the facts under consideration. In the just cited case the employees were engaged to work regularly both upon the dock of their employer and upon ships which came to that dock to be unloaded. The contract of employment contemplated [fol. 93] that the employees should unload the ships as well as handle coal on the dock. That case arose under the Wisconsin compensation act which is compulsory, and the Supreme Court held "that the State had no power to impose upon the employer liabilities of that kind in respect of men engaged to perform the work of stevedores on ship board." The Texas compensation act is elective, and, as already stated, the injury here complained of was accidental and was not attributable to a maritime tort. Both the employer and the employee could have refused to accept the benefits and responsibilities of the State statute. If the employee had done that he could have recovered nothing in admiralty. Any liability in this case therefore arises out of a contract, the enforcement of which cannot affect any principle of the admiralty law. Under elective compensation laws it has been held by the Supreme Courts of Maine and Oregon that liability exists in cases of accidental injury to an employee engaged in maritime employment, where such injury is not caused by tort. Berry v. Donovan & Sons (Me.), 155 Atlantic 250; West v. Kozer, 104 Ore. 94; Rickert v. State Industrial Accident Commission, 22 Ore. 565. We are not aware of any ruling to the contrary by the Supreme Court of the United States.

The judgment is affirmed.

[fol. 94] In United States Circuit Court of Appeals

[Title omitted]

Dissenting Opinion—Filed March 29, 1929

Foster, Circuit Judge, dissenting:

This suit is against an insurance company and it is stipulated that the policy covered only such employees as were

within the scope of the Texas Workmen's Compensation Act. The Texas law could not be made to apply to seamen engaged in interstate commerce. It also is agreed that a man employed by the Ford Motor Company signifies by signing an employment slip that he is open for any kind of work within the jurisdiction of the company. It seems to me to be immaterial how much or how little work he does of unloading vessels. While doing that work he is to be classed as a seaman. When the deceased was injured he was employed as a seaman engaged at the time in interstate commerce. I must admit that it is difficult to reconcile the various decisions dealing with state compensation laws as applied to maritime torts but I can see no distinction in principle between the case at bar and the case of Northern Coal Co. vs. Strand, 278 U. S. 142. On the authority of that case, which is the latest decision of the Supreme Court of which I am aware, I respectfully dissent.

[fol. 95] In United States Circuit Court of Appeals

No. 5395

Employers' Liability Assurance Corporation, Limited, of London, England,

versus

Mrs. Myrtis Cook et al.

Judgment—Mar. 9, 1929

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Employers' Liability Assurance Corporation, Limited, of London, England, and the surety on the appeal bond herein, American Employers Insurance Co. of Boston, Mass., be

condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

Foster, Circuit Judge, dissenting.

[fol. 96] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LTD., OF LONDON, ENGLAND, Appellant,

vs.

MYRTIS COOK et al., Appellees

Motion for Rehearing of Employers' Liability Assurance Corporation, Ltd., of London, England

PETITION FOR REHEARING—Filed April 11, 1929

Now comes the appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, in the cause above numbered in which this motion is filed, and moves the Court to set aside the judgment rendered therein on March 29th, 1929, and grant it a rehearing for the following reasons, to-wit:

First

The Honorable Circuit Court of Appeals erred in affirming the judgment of the District Court and in holding that the Texas Workmen's Compensation Act, providing for compensation for accidental injuries and death to employees [fol. 97] applied where the deceased employee sustained an accidental injury while in the hold of a vessel unloading the same, which vessel was lying in navigable waters and while said employee was engaged in the performance of a maritime service and within the course and scope of his employment, because the said cause of action, if any, was exclusively within the maritime jurisdiction of the United States District Court.

Second

The Honorable Circuit Court of Appeals erred in affirming the judgment of the District Court because there was no evidence of more than a scintilla that the deceased employee received an accidental injury in the course of his employment which resulted in his death.

Wherefore appellant prays that the issuance of mandate may be withheld until this motion is disposed of; that this motion be granted; the judgment of this Court heretofore entered be set aside and the cause be reversed and here rendered for appellant; or, in the alternative, that it be reversed and remanded for a new trial.

Respectfully submitted.

Fred R. Switzer, C. M. Hightower, Attorneys for Appellant. Vinson, Elkins, Sweeton & Weems, of Counsel.

[fol. 98] Certificate of Counsel

I, C. M. Hightower, one of the attorneys for appellant, Employers' Liability Assurance Corporation, Ltd., of London, England, hereby certify that I prepared the foregoing Motion for Rehearing and know the contents thereof, and in my opinion the same is well founded, and that the prayer of appellant for rehearing should be granted by this Court.

C. M. Hightower, Attorney for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 99] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—April 23, 1929

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 100] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

MOTION FOR ORDER STAYING MANDATE—Filed April 24, 1929

Now comes the Employers' Liability Assurance Corporation, Ltd., of London, England, appellant in the above cause and would show that on April 25th, A. D. 1928, in the District Court of the United States for the Southern District of Texas, the appellees, Mrs. Myrtis Cook and her minor daughter, Geraldine Cook, recovered a judgment against appellant in the sum of Seventy-two Hundred Dollars ($7,200.00) being Three Hundred and Sixty (360) weeks' compensation at the rate of Twenty Dollars ($20.00) per week as provided by the Texas Workmen's Compensation Act, the amount of the judgment being apportioned one-third (⅓) to each of appellees and one-third (⅓) to their attorney of record, Sam C. Polk, the said judgment bearing interest at the rate of six per cent (6%).

That a timely appeal was sued out by appellant to this court and it superseded said judgment by giving bond in the sum of Ten Thousand Dollars ($10,000.00) with the American Employers' Insurance Company of Boston, Massachusetts, as surety.

[fol. 101] That upon appeal, this court, on the 29th day of March, A. D. 1929 entered its order and judgment in all things affirming the judgment against the appellant.

That the appellant feeling itself aggrieved by the action of this court in affirming said judgment is desirous of, and will apply to the Supreme Court of the United States for a writ of certiorari to review said order and judgment entered by this court.

Wherefore, it prays that an order be issued herein staying issuance of the mandate of this court and the issuance of execution and enforcement of said judgment until the Supreme Court of the United States passes upon the application of certiorari to be made thereto on behalf of the appellant, and the amount of bond required to be given by

this appellant pending said application for said writ of certiorari be fixed in the order granting said stay.

Respectfully submitted.

(Signed) Fred R. Switzer, C. M. Hightower, Attorneys for Appellant, Employers' Liability Assurance Corporation, Ltd., of London, England.

[fol. 102] In United States Circuit Court of Appeals

Order Staying Mandate

On consideration of the application of the Appellant in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable Appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, it is ordered that the issue of the mandate of this court in said cause be and the same is stayed for the period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that the certiorari petition, record and brief have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 35 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, Louisiana, this 24th day of April, A. D. 1929.

(Signed) R. W. Walker, United States Circuit Judge.

[fol. 103] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,194. United States Circuit Court of Appeals, Fifth Circuit. Term No. 81. Employers' Liability Assurance Corporation, Ltd., of London, England, petitioner, vs. Mrs. Myrtis Cook et al. Petition for writ of certiorari and exhibit thereto. Filed May 9th, 1929. File No. 34,194.